89-186



No. _____

In The

# Supreme Court of the United States

**October Term, 1989**

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC.

*Petitioner,*

vs.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., et. al.

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Does Federal Rule of Civil Procedure 17(b) require a federal court to adopt a state rule of corporate capacity when to do so permits antitrust violators to use their own illegal conduct to shield them from Sherman Act liability, frustrating the basic enforcement goals of the antitrust laws?

2. Can a state law rule that comes into play because of the illegal antitrust conduct challenged in the lawsuit operate to deprive a favored litigant of its constitutional right of access to federal court?

3. Is the statute of limitations on a Sherman Act claim tolled while an issue basic to the dispute is the subject of proceedings before the National Labor Relations Board?

## LIST OF PARTIES

The following parties to the proceeding in the court whose judgment is sought to be reviewed, in addition to those listed in the caption, are listed below:

IBEW-NECA Pension Trust Fund

Southern Sierras Chapter, NECA

John Gomes

Industrial Elec., Inc.

Dennis Thorson

Thorson Elec., Inc.

International Brotherhood of Electrical Workers, AFL-CIO

IBEW, Local Union 11

IBEW, Local Union 440

Los Angeles County Chapter, NECA

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Community Electric Service of Los Angeles, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 6, 1989, as amended April 27, 1989 and as corrected by minute order filed May 10, 1989.

On April 27, 1989 the Ninth Circuit denied the timely filed Petition for Rehearing filed by Community Electric Service of Los Angeles, Inc.

## OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 869 F.2d 1235. The original slip opinion appears as Appendix A hereto. The Court's amended opinion appears as Appendix B. The order denying the petition for rehearing appears as Appendix C. The May 10 order correcting the amended opinion appears as Appendix D.

## JURISDICTION

Petitioner brought this action in the United States District Court for the Central District of California invoking that court's jurisdiction pursuant to 28 U.S.C. section 1331. Upon the district court's granting of summary judgment, the Court of Appeals had jurisdiction over petitioner's appeal pursuant to 28 U.S.C. section 1291.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article VI of the United States Constitution provides in relevant part:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment of the United States Constitution provides in relevant part:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Section One of the Fourteenth Amendment of the United States Constitution provides in relevant part:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

15 U.S.C. section 1 provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

15 U.S.C. section 15 provides in relevant part:

"[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Federal Rule of Civil Procedure 17(b) provides in relevant part:

"The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."

California Revenue and Taxation Code section 23301 provides as follows:

"Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or

to set forth a new name, the corporate powers, rights and privileges of a domestic taxpayer, may be suspended . . . [for failure to pay specified taxes.]"

## STATEMENT OF THE CASE

Community Electric Service of Los Angeles, Inc. ("CES") was incorporated in California in 1976. It successfully conducted business in Los Angeles County as an electrical contracting firm until driven out of business.

In 1981 CES sought to expand its market out of the immediate Los Angeles metropolitan area to the Palm Springs desert where major construction efforts were underway. In order to do so, CES signed a letter of assent, binding it to the then-existing Inside Wireman's Agreement between the International Brotherhood of Electrical Workers (IBEW) Local 440 and the Southern Sierras Chapter of the National Electrical Contractors Association (NECA), the management organization for electrical contractors. As CES was soon to experience firsthand, the terms of that agreement operated as a barrier to entry, unfairly burdening CES and other businesses new to the jurisdiction in plain violation of federal antitrust law. (See Appendix E [Affidavit of Donald L. Martin].) The local NECA chapter, in concert with the local IBEW, both of their parent bodies, their Los Angeles County counterparts, indigenous electrical contractors, and a union-management trust fund acted to restrain trade, which in the end drove CES not only out of the Palm Springs electrical contracting market but completely out of business.

As the direct result of the collusive labor agreement and the varied efforts to enforce it, CES was unable to

meet its financial responsibilities, including those to the Internal Revenue Service and (what would ultimately prove to be even more fatal) those to the California Franchise Tax Board. On May 6, 1983, CES was forced to cease its operations when the IRS seized its assets. Shortly thereafter, unbeknownst to CES, its California corporate powers were suspended for nonpayment of state taxes.

On January 13, 1986, CES timely filed this action in the United States District Court for the Central District of California, seeking damages and equitable relief under the Sherman Act, and naming as defendants each of the conspiring entities and individuals that had run it out of business. On June 8, 1987, almost a year and a half after the lawsuit began, defendants sought a status conference on CES's capacity to sue, based on the fact that at the time the case had been filed CES's corporate powers were under suspension. Upon learning of the suspension CES took immediate action to gain reinstatement.[1] Nonetheless, on August 6, 1987, the district court granted summary judgment for defendants and terminated the action, looking to California law to determine CES's capacity to sue (Fed. R. Civ. P. 17(b).) The district court relied on a

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[1] On June 8, 1987, CES's corporate powers were reinstated, pursuant to California Revenue and Taxation Code section 23305b which provides for reinstatement without full payment of back taxes. California revived CES's corporate powers specifically so that CES could prosecute this lawsuit. Because California has reinstated CES's corporate powers to bring this lawsuit, and has a lien on the proceeds of the action, the state has a strong interest in allowing CES to continue to pursue this case.

California court of appeal decision holding that the subsequent revivor of a suspended corporation is ineffective to validate retroactively a timely filed complaint. *Welco Construction, Inc. v. Modulux, Inc.*, 47 Cal.App.3d 69, 120 Cal.Rptr. 572 (1975). By applying *Welco*, the district court applied California law so as to cut off CES's substantial federal right.

CES appealed, but the Court of Appeals for the Ninth Circuit affirmed, holding that: "[Federal Rule of Civil Procedure] Rule 17(b) prevails over antitrust law and requires us to apply California law [i.e. on corporate capacity]." *Community Electric Service of Los Angeles, Inc. v. National Contractors Association, Inc.*, 869 F.2d 1235, 1239 (9th Cir. 1989).

## REASONS FOR GRANTING REVIEW

### I.

### THE COURT OF APPEALS' CONSTRUCTION OF RULE 17(b) – IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS – PERMITS STATE RULES OF PROCEDURE TO FRUSTRATE THE SUBSTANTIVE POLICY OF THE SHERMAN ACT OR, INDEED, ANY OTHER FEDERAL LAW. THE SUPREMACY CLAUSE AND THE SUBSTANTIVE GOALS OF ANTITRUST LAW PRECLUDE SUCH A CONSTRUCTION OF RULE 17(b).

Rule 17(b) states federal courts should look to state law to determine a party's capacity to sue. In those instances when federal jurisdiction rests on diversity, application of the forum state's rules promotes fairness. See *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949);

*Angel v. Bullington*, 330 U.S. 183 (1947). There is no reason why a litigant who chooses to bring a state law action in federal court should thereby gain any greater benefit or be treated differently than if the case were instead filed in state court. But this logic does not apply when the basis of the action is federal – not state – law. In federally based actions, blind deference to state capacity rules would permit state law to close the door to the federal courthouse, thereby defeating the substantive policies of federal law, as in this case.

"[F]ederal courts must be ever vigilant to insure that application of state law poses 'no significant threat to any identifiable federal policy or interest. . . .' " *Burks v. Lasker*, 441 U.S. 471, 479 (1979), quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). Federal courts must reject "aberrant" or "hostile" state laws to assure that state-made law does not destroy the federal right. *Burks v. Lasker, supra*, 441 U.S. at 479-80. Federal courts should not follow – much less create – a state law rule that jeopardizes more important federal rights.

The antitrust violations that CES challenged in this lawsuit rendered CES unable to pay its franchise taxes, resulting in its lack of capacity to sue under state law. By adopting the California law of corporate capacity expressed in the *Welco* opinion, the Court of Appeals, in essence, has allowed defendants' illegal antitrust activity to shield them from all liability to their victim. This result is completely at odds with clear congressional intent that victims of anticompetitive conduct be able to pursue federal remedies in a federal forum. 15 U.S.C. § 15; see *Blumenstock Bros. v. Curtis Pub. Co.*, 252 U.S. 436, 440

(1920) [federal courts have exclusive jurisdiction to enforce the antitrust laws].

Congress intended its antitrust legislation to be given maximum scope so as to advance national goals of paramount import. Thus Congress extended "the substantive prohibition of the Sherman Act to the farthest reaches of its power under the Commerce Clause, thereby mandating for this nation a competitive business economy to the full extent that [it] could . . . under its constitutional power to regulate interstate and foreign commerce." *Gough v. Rossmoor Corp.*, 487 F.2d 373, 375-376 (9th Cir. 1973). Congress enabled those business entities injured by illegal antitrust activity to pursue private actions because this is a primary means of advancing these national goals. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) ["In enacting these laws, Congress had many means at its disposal to penalize violators. . . . (but) chose to permit all persons to sue to recover three times their actual damages every time they were injured . . . by an antitrust violation. . . . (thereby) encourag(ing) these persons to serve as 'private attorneys general.' "].

"The antitrust laws are an expression of federal public policy to foster free competition. The treble-damage action was designed to implement that policy by encouraging private suitors to enforce the antitrust laws and thereby to deter potential violators from undertaking the forbidden conduct." *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073, 1075 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). Maintenance of an antitrust suit can never be made to hinge on the availability of a state or common-law remedy. *Id.* The California rule adopted by the district court and sanctioned on appeal frustrates

these paramount congressional goals by rewarding those antitrust violators who are the most successful in their anticompetitive conduct – those who put the competition completely out of business – by permitting them to evade all liability for their illegal acts. Rule 17(b) does not permit, much less require this result.

Federal Rule of Civil Procedure 17(b) directs federal courts to look to state law in order to determine whether a particular party has the capacity to sue or defend a lawsuit. It is far from certain that the Rule was intended to be applied at all in a federal question lawsuit. Leading commentators on the Federal Rules appear to treat Rule 17(b)'s directive as applying only in those actions brought under a federal court's diversity powers. 6 Wright & Miller, *Federal Practice and Procedure*, § 1561, p. 735 (1971) ["Of course, if subject matter jurisdiction is not based upon diversity of citizenship, the federal court need not apply forum state restrictions on a corporation's ability to sue."]; 3*A Moore's Federal Practice*, § 17.21, p. 17-174 (2d ed. 1989) ["Where the relevant substantive law is federal . . . the state statute should not be applicable."]. These authorities correctly criticize adopting state corporate capacity definitions that operate to defeat a federal claim.

There is no question that "[c]onsiderations of state law may be displaced where their application," as here, "would be inconsistent with the federal policy underlying the cause of action under consideration." *Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1975). This well-defined principle has been applied in the specific context of Rule 17(b) to disregard a state capacity law that deprived prisoners (who under then-existent state law lacked capacity to sue throughout their imprisonment) of

the ability to pursue civil rights claims. *Weller v. Dickson*, 314 F.2d 598, 601 (9th Cir. 1963), *cert. denied*, 375 U.S. 845 (1963), approving of *McCollum v. Mayfield*, 130 F.Supp. 112, 116 (N.D. Cal. 1955) ["a literal application of Rule 17(b) . . . would bring about an artificial and erroneous result. Such a provision cannot be applied mechanically to every case. . . .(T)he logical corollary of defendants' argument (that plaintiff lacked capacity to sue during his imprisonment) is that if plaintiff were imprisoned for life, his remedy for the alleged invasion of his federally protected constitutional rights would be completely lost through the operation of a local statute."]; see also *Almond v. Kent*, 459 F.2d 200, 202 (4th Cir. 1972) and cases cited therein; *Beishir v. Swenson*, 331 F.Supp. 1224, 1226 (W.D. Mo. 1970); *Wilson v. Garnett*, 332 F.Supp. 888, 890 (W.D. Mo. 1970).

As these cases illustrate, Rule 17(b) cannot be construed to require a federal court to mechanically adopt a state capacity law which is in fundamental conflict with the substantive purpose of the federal litigation at issue. Indeed in a similar context, this Court has held that a state law that limited a prisoner's ability to seek federal *habeas corpus* relief could not interfere with the plain congressional intent that prisoners be able to freely pursue "the Great Writ." *Johnson v. Avery*, 393 U.S. 483, 485 (1969). By contrast, because the Louisiana law at issue in *Robertson v. Wegmann*, 436 U.S. 584, 588 (1978) was not inconsistent with the fundamental purpose of the Civil Rights Act of 1871, this Court found no fatal conflict between that state's legislative scheme for survival of actions and the advancement of civil rights. Although under Louisiana law the decedent's civil rights claim

abated because he was not survived by any heirs entitled under the survivorship statute to pursue his claim, the statutory scheme was not infirm because it was not generally inhospitable to the survival of 42 U.S.C. section 1983 actions nor did it have some other independent adverse effect upon the policies underlying the civil rights laws. *Id.*

Because it was not raised by the facts of that case, *Robertson* highlighted but did not reach the crucial issue CES raises here – whether a state law that completely eviscerates the underlying purpose of the plaintiff's federal claim can be countenanced in a case where the exact "deprivation of federal rights" being sued for also undermined the plaintiff's ability to sue. *Robertson*, 436 U.S. at 594. This question – whether a federal remedy can be utterly defeated by a state law that comes into play only because of the substantive violation of federal law – was answered in *Guyton v. Phillips*, 532 F.Supp. 1154 (N.D. Cal. 1981), disapproved on other grounds in *Peraza v. Delamater*, 722 F.2d 1455, 1457 (9th Cir. 1984). In that case the district court refused to limit an estate to those damages available under California law (which precluded recovery for pain and suffering in a wrongful death suit) precisely because the police conduct that violated Guyton's civil rights also caused his death, i.e., police officers shot him at close range in the back of the head. Denying the estate recovery for pain and suffering "would strike at the very heart of a § 1983 action." *Guyton*, 532 F.Supp. at 1166.

Applying California's restrictive corporate capacity rule where the antitrust violation caused the incapacity in the first place impermissibly frustrates federal antitrust policy. Federal courts must be ever vigilant to see that a

defendant does not benefit from the illegal conduct that caused the plaintiff's "disability" (see *Crawford v. United States*, 796 F.2d 924, 926 (7th Cir. 1986); *Clifford by Clifford v. United States*, 738 F.2d 977, 979 (8th Cir. 1984). Rule 17(b) cannot be construed to permit defendants to evade antitrust liability simply because their anticompetitive conduct was so successful.

## II.

## A STATE LAW THAT BARS A CLASS OF LITIGANTS FROM SEEKING A FEDERAL REMEDY FOR VIOLATION OF THEIR FEDERAL RIGHTS OFFENDS ESSENTIAL PRINCIPLES OF DUE PROCESS.

The *Welco* rule applied in this case to defeat petitioner's antitrust claim is a door-closing law that violates due process by depriving petitioner of its right of access to the federal courts, its only avenue of redress for violation of the Sherman Act. A potential litigant's right of access to the courts must be jealously guarded against "denial by particular laws that operate to jeopardize it for particular individuals." *Boddie v. Connecticut*, 401 U.S. 371, 379-380 (1971); *NAACP v. Button*, 371 U.S. 415 (1963); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1262 (7th Cir. 1984). "The right of access to the courts is substantive rather than procedural. Its exercise can be shaped and guided by the state [citation], but cannot be obstructed, regardless of the procedural means applied." *Moreilo v. James*, 810 F.2d 344, 346-347 (2d Cir. 1987). Even though a state statute furthers some important state interest, it will be found to be constitutionally infirm if in application it deprives a litigant of the right to have its matter heard.

*NAACP v. Button, supra,* 371 U.S. at 439; *Boddie v. Connecticut,* 401 U.S. at 379-380.

This principle has been held to prevail even though the state's power to legislate to protect its own legitimate interest is beyond question. Thus, for example, although regulating "barratry, maintenance and champerty" was a laudable goal, this Court held that laws passed under the guise of prohibiting lawyers from soliciting clients that in practice foreclosed the NAACP from seeking named plaintiffs for lawsuits brought as a means of ending racial discrimination were unconstitutional as applied. *NAACP v. Button,* 371 U.S. at 439.

A federal court must balance the state's asserted interest in its law against the subject matter of the intended litigation to determine whether the state purpose is sufficiently important to override the constitutionally-protected right of the litigant to have its matter heard. Applying this balancing test, Connecticut's interest in assessing fees sufficient to recoup the costs of processing divorces had to give way to the plainly more important interest of an indigent's ability to secure a divorce. *Boddie v. Connecticut,* 401 U.S. at 380-381. Of course, whenever the litigation in question is brought not just for private gain but as a means to advance the public good, courts must accord even greater weight to the constitutionally protected right to sue. See *NAACP v. Button,* 371 U.S. at 429 [for the NAACP "litigation is not a technique of resolving private differences; it is a means

for achieving the lawful objectives of equality of treatment. . . ."].

The lack of capacity that sounded the death knell for CES's Sherman Act claims came about because the corporation could not pay its taxes as a result of defendants' anticompetitive conduct. California's only purpose in suspending CES's corporate powers was a practical one – to collect the taxes due it.[2] This California interest is fundamentally no different from Connecticut's desire to offset the cost of processing divorces. Even if this interest were opposed to prosecution of this lawsuit if it were in the state courts, it could not close the doors to the federal courthouse. In reality, California's interest in tax collection is furthered in the same way the policy of the Sherman Act is furthered – by affording CES its constitutional right of access to the federal courts.

The right of access to the courts is fundamental. Rule 17(b) cannot be construed, and state law cannot be applied, to deny this right.

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[2] While the federal interest in private antitrust enforcement is only advanced if CES is allowed to pursue its case, that is also true of the state's only interest, tax collection (see *Peacock Hill Ass'n v. Peacock Lagoon Constr. Co.*, 8 Cal.3d 369, 371 (1972)). The State of California has a lien on the proceeds of CES's suit and can look forward to recovering the back taxes only if the lawsuit proceeds.

## III.

## THE COURT OF APPEALS' FAILURE TO FIND THE STATUTE OF LIMITATIONS TO BE TOLLED BY PENDING NLRB PROCEEDINGS UNDERMINES THE PRIMARY JURISDICTION OF SPECIALIZED AGENCIES, FRUSTRATES ANTITRUST POLICY AND INVITES NEEDLESS WASTE OF SCARCE JUDICIAL RESOURCES.

Local 440 brought proceedings before the NLRB to establish the subsistence provisions of the Inside Wireman's Agreement as a mandatory subject of bargaining. CES defended, inter alia, on the grounds the agreement was in violation of the antitrust laws. The Administrative Law Judge ruled in favor of CES.[3] Defendants appealed. The NLRB held the challenged provisions were enforceable, but declined to reach the antitrust issues. (CR 86, Exhibit D.)

At least one Court of Appeals has held that a determination whether conduct is a subject of mandatory collective bargaining is essential to invocation of the labor exemption to the antitrust laws. *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). And the NLRB has primary jurisdiction over this issue. 29 U.S.C. section 158(d).

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[3] The Administrative Law Judge concluded, "While the antitrust implications of these contract clauses appear to be deserving of serious consideration . . . I shall dismiss this case for failure of . . . counsel . . . to demonstrate that subsistence pay is a mandatory subject of bargaining, or that its purpose is other than to attempt to place a substantial roadblock in the path of employers who may wish to bid on jobs within the geographical jurisdiction of the Union." (CR 86, Exhibit C.)

In the instant case, the Court of Appeals held the antitrust statute of limitations was not tolled by the NLRB proceedings because "prior resort to the Board was not a prerequisite to review in federal court." 869 F.2d at 1241. This crabbed construction of tolling principles is inconsistent with this Court's holding in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), and undermines both the primary jurisdiction of the NLRB and the policies of the antitrust laws. It also invites wastefully duplicative proceedings.

In many respects this case parallels *Ricci*. There, the antitrust claim involved factual issues and questions about the scope, meaning and significance of rules of the Commodity Exchange Commission. This Court affirmed a stay of judicial action pending administrative proceedings, rejecting the position advocated by the dissenters, which sounds very much like the opinion of the Court of Appeals in this case.

It is true here, as it was in *Ricci*, that the administrative agency did not have exclusive authority to determine whether the challenged conduct was exempt from the antitrust laws or, if not exempt, in violation of them. Nevertheless, here, as there, the agency's determination of issues within its jurisdiction would "be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulatory regimes. . . ." 409 U.S. at 307.

Given the NLRB's primary jurisdiction over an issue basic to the antitrust dispute, common sense and public policy require a tolling of the statute of limitations. *Id.*;

see also *United States v. Western Pacific Railroad*, 352 U.S. 59, 64 (1956).

## CONCLUSION

We respectfully submit that a writ of certiorari should issue and the judgment and decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

MORGAN, WENZEL & MCNICHOLAS
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ALAN G. MARTIN

By Alan G. Martin

**APPENDIX A**

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC.,
*Plaintiff-Appellant-Cross-Appellee,*

v.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., ET AL.,
*Defendants-Appellees-Cross-Appellants.*

Nos. 87-6280; 88-5616; 88-5663

D.C. No. CV-86-0254-RSWL

OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
November 4, 1988 – Pasadena, California

Filed March 6, 1989

Before: Eugene A. Wright, William A. Norris and Charles Wiggins, Circuit Judges.

Opinion by Judge Wright; Concurrence by Judge Wiggins

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**SUMMARY**

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**Corporations and Business Organizations/Antitrust**

The court affirmed the district court's granting of a motion for summary judgment, holding that a suspended

corporation did not have the capacity to sue, and that denial of sanctions against plaintiff was proper.

Appellant Community Electric Service of Los Angeles, Inc. (CES), a contractor, sued appellee National Electrical Contractors Association, Inc. (NECA), a trade union, for antitrust and RICO violations. Prior to filing, the Franchise Tax Board suspended CES's corporate powers, rights and privileges. A certificate of revivor was issued, reinstating CES. The district court dismissed the case, holding that CES lacked capacity to sue at the time the complaint was filed, and that the reinstatement was ineffective to validate the filing. The antitrust statute of limitations expired before the reinstatement. The defendants moved for Rule 11 sanctions, which were denied. CES contends that federal antitrust law should control its capacity to sue because of the federal interest involved.

[1] F.R.Civ.P. 17(b) provides that a corporation's capacity to sue or be sued is determined by the law under which it was organized. [2] Rule 17(b) prevails over antitrust law and requires the application of California law. [3] Under California law, CES had no capacity to sue at the time it filed the complaint. [4] Where the revivor issues after the statute of limitations has expired, California courts have held that corporate reinstatement will not validate retroactively the earlier filing. [5] NLRB proceedings did not toll the limitations period because resort to the Board was not a prerequisite to seeking relief in federal court. [6] There was no evidence that the district court erred in denying Rule 11 sanctions.

Concurring in part I of the opinion and in the judgment affirming the district court, Judge Wiggins adds that

the district court should be affirmed on the sanctions issue because the motion under Rule 11 came too late to serve its intended purpose.

## COUNSEL

Pamela Victorine, Beverly Hills, California; John P. McNicholas, Los Angeles, California, for the plaintiff-appellant-cross-appellee, Community Electric Service.

D. William Heine, Los Angeles, California; Gary L. Lieber, Washington, D.C.; Jack R. White, Los Angeles, California, for the defendants-appellees-cross-appellants, National Electrical Contractors Association.

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## OPINION

WRIGHT, Circuit Judge:

This case involves the consolidation of three appeals from an antitrust suit with nine defendants. We must determine whether Community Electric Service, Inc. had the capacity to sue in federal court and whether its pleadings warrant Rule 11 sanctions.

### FACTS

Community Electric, an electrical contracting company operating in Los Angeles County, bid successfully on a Palm Springs contract in an effort to expand its business geographically. It signed a letter of assent binding it to a collective bargaining agreement between the International Brotherhood of Electrical Workers (IBEW)

Local 440 and Southern Sierras National Electrical Contractor's Association, Inc. (NECA).

The IBEW Local 440 – Southern Sierras NECA agreement (termed "the Inside Wiremans' Agreement") has a provision effectively imposing a $55 per day travel/subsistence payment on non-local contractors for each employee on a job. It applies to jobs begun before the contractor has maintained a permanent place of business within the jurisdiction for 90 days.

Community Electric contends vigorously that this provision has the purpose and effect of excluding non-local contractors. It claims that the provision sets prices and makes it impossible for non-local contractors to compete on equal footing with local contractors.

Community Electric attempted dispute resolution under the terms of the agreement. A labor management committee ruled against it unanimously.

These provisions were also the subject of proceedings before the National Labor Relations Board. It held the subsistence payments a mandatory subject of bargaining and enforceable, but declined to address the antitrust implications.

Community Electric asserts that its challenges resulted in retaliatory action. Besides claiming harassment from Southern Sierras NECA and Local 440, Community Electric alleges additional harassment from their Los Angeles counterparts. It contends that Los Angles NECA and Local 11, as well as the IBEW-NECA pension trust fund, enforced several rules discriminatorily.

On January 13, 1986, Community Electric filed a complaint alleging violations of the Sherman Act, the Racketeer Influenced and Corrupt Organizations Act (RICO), and related California state law claims. It named as defendants the Southern Sierras and Los Angeles County Chapters of the NECA, their parent body, National NECA, Locals 11 and 440 of the IBEW, their parent body, International IBEW, two owners of electrical contracting firms from Palm Springs, John Gomes and Dennis Thorsen [sic], and the Southern California IBEW-NECA Pension Trust Fund.

On July 1, 1983, before the filing, the California Franchise Tax Board had suspended Community Electric's corporate powers, rights, and privileges. The defendants in their answer alleged Community Electric's lack of capacity to sue.

On May 28, 1987, the California Secretary of State's Office informed the defendants that Community Electric's corporate powers, rights, and privileges were suspended. The defendants notified Community Electric and on June 8 filed a request for a status conference. That day, the California Tax Franchise Board issued a certificate of revivor reinstating Community Electric's corporate powers for the purpose of pursuing this litigation.

On August 6, 1987, the court dismissed the case, holding that Community Electric lacked the capacity to file a complaint in January 1986 due to the July 1983 suspension. It also determined that the reinstatement was ineffective to validate the January filing. The antitrust statute of limitation expired May 6, 1987, four years after

Community Electric ceased doing business. The June 8 reinstatement occurred too late.

After the dismissal, the defendants moved for Rule 11 sanctions. The court denied them, concluding that neither the complaint nor Community Electric's subsequent documents violated Rule 11's "Frivolousness Clause."

Community Electric appeals the grant of summary judgment and defendants appeal the denial of their Rule 11 motion.

## DISCUSSION

### I. *Time Barring of Community Electric's Claims*

#### A. Capacity to File Suit

[1] Federal Rule of Civil Procedure 17(b) provides that "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Community Electric filed before the antitrust statute of limitation (15 U.S.C. § 15b (1982)) expired. The court held it had no capacity to sue under California law, the law of the state where it incorporated. Community Electric argues that federal antitrust law should prevail because of the federal interest involved.

[2] We hold that Rule 17(b) prevails over antitrust law and requires us to apply California law. In *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987), we rejected the argument that the Comprehensive Environmental Response Compensation Liability Act of 1980 (CERCLA) prevails over 17(b). The plaintiffs sued a corporation for claims arising after its

dissolution. *Id.* at 1449. As the plaintiffs in that case, Community Electric cites no authority in support of its position and other courts have held to the contrary. *See id.* at 1451.

We follow the other circuits that apply state law even when it requires dismissing an antitrust suit. *See Moore v. Matthew's Book Co.*, 597 F.2d 645, 646-47 (8th Cir. 1979); *R.V. McGinnis Theatres v. Video Indep. Theatres, Inc.*, 386 F.2d 592, 593-95 (10th Cir. 1967), *cert. denied*, 390 U.S. 1014 (1968). This follows since corporations are creatures of state law. *Cf. Cort v. Ash*, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law").

The facts of *R.V. McGinnis Theaters* parallel this case. 386 F.2d at 593-94. McGinnis sued for alleged antitrust violations. Oklahoma had revoked McGinnis' charter for failing to pay its corporate franchise tax. McGinnis relied on a later reinstatement.

The Tenth Circuit affirmed the lower court decision to dismiss. *Id.* at 594-95. The relevant statute permitted reinstatement only where payment of the tax occurs within a year of suspension and McGinnis had paid after the year expired. *Id.*

[3] Applying California law, Community Electric had no capacity to sue in January 1986. Section 23301 of the California Revenue and Tax Code provides that the Franchise Tax Board may suspend the rights, powers and privileges of a corporation for nonpayment of taxes.

A delinquent California corporation may neither bring suit nor defend a legal action, *E.g., Green v. Norman*, 309 P.2d 809, 812 (Cal. 1957). We have repeatedly

acknowledged this as the law of California. *See United States v. 2.61 Acres of Land, More or Less*, 791 F.2d 666, 668 (9th Cir. 1985) (reversing refusal to grant continuance in order to enable corporation to revive itself); *cf. In re Christian & Porter Aluminum Co.*, 584 F.2d 326, 331-32 (9th Cir. 1978) (appeal by 14 suspended California corporations dismissed). Because the Franchise Tax Board suspended Community Electric, it had no capacity to sue.

B. *Retroactive Effect of Corporate Revival*

The antitrust statute of limitation expired May 6, 1987. The Board reinstated Community Electric on June 8, 1987. Community Electric argues that this reinstatement gave it the capacity retroactively for the January filing.

We apply California law to determine whether Community Electric may obtain retroactively the capacity to sue. The California statutory scheme provides for suspension under § 23301 and revival under § 23305 or § 23305b. Community Electric was revived without paying its taxes under § 23305b. Section 23305a, which applies to revival under either §§ 23305 or 23305b, states: "[u]pon the issuance of such certificate by the Franchise Tax Board the taxpayer therein named shall become reinstated but *such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture.*" (emphasis supplied).

[4] No California Supreme Court decision has addressed the situation where the revivor issues after the statute of limitation has expired. Every California court facing this question has held that corporate reinstatement will not validate retroactively the earlier filing. These

decisions conclude that the expiration of a statute of limitation qualifies as a "defense" that "has accrued."

Since we must apply California law and have no Supreme Court decision, we look to the decisions of the intermediate state courts of appeal. *See, e.g., Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 735 (9th Cir. 1986) (applying California law to breach of contract claims). We follow the decision of a state court of appeal unless convincing evidence exists that the state supreme court would decide the issue differently. *Id.*

The court below specifically relied on *Welco Constr., Inc. v. Modulux, Inc.*, 120 Cal. Rptr. 572, 573 (Ct. App.), *cert. denied*, 120 Cal. Rptr. 572 (1975). Welco had filed a complaint after suspension of its corporate status. Modulux answered, but did not challenge Welco's standing to prosecute until the day of trial. Welco obtained a certificate of revivor on that day. The trial court permitted Modulux to amend its answer to plead the statutes of limitations and granted a judgment of nonsuit.

The court of appeal affirmed, applying the language of § 23305a. *Id.* at 574-75. It concluded that prior California decisions distinguish a plea in abatement from a defense. Facts warranting a plea in abatement must exist at the time of the plea and corporate revivor will validate retroactively the acts abated. In contrast, a statute of limitations is a defense and the revivor will not validate a prior filing of suit. *Id.*

Recently another California district court of appeal reaffirmed the holding in *Welco* and the California Supreme Court denied review, as it had for *Welco*. *See ABA Recovery Serv., Inc. v. Konold*, 244 Cal. Rptr. 27, 30 (Ct.

App. 1988). Although *ABA Recovery* involved a separate statute of limitation, the court applied the *Welco* analysis and reached the same result. *See id.; accord Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.*, 176 Cal. Rptr. 239, 245 (Ct. App. 1981) (revival of a corporation cannot prejudice a statute of limitations defense that accrues during suspension of its powers).

Community Electric says that *Welco* does not represent California law or does not apply to this suit. First, it argues that corporate revival validates retroactively all prior acts undertaken during periods of suspension, even after accrual of a defense. Second, it argues that *Welco* treats a statute of limitation as a meritorious defense incorrectly.

Community Electric provides no persuasive reason for treating the antitrust statute of limitation differently than those involved in *Welco* and *ABA Recovery*. Both cases dealt with the argument that corporate revival validates retroactively all prior acts undertaken during periods of suspension. Both rejected the argument, relying on *Traub Co. v. Coffee Break Serv., Inc.*, 57 Cal. Rptr. 846, 848 (1967). The court in *Traub* allowed a revivor to validate a judgment obtained during suspension, but distinguished *Cleveland v. Gore Bros., Inc.*, 58 P.2d 931 (Cal. Ct. App. 1936), as "present[ing] a statute of limitations problem." 57 Cal. Rptr. at 848.

Community Electric cites no authority that convinces us that the California Supreme Court has changed its position since *Traub*. This seems true where, as here, the Court had a recent opportunity to address the issue but avoided it. *See Tenneco West, Inc. v. Marathon Oil Co.*, 756

F.2d 769, 771 (9th Cir.), *cert. denied*, 474 U.S. 845 (1985) (intermediate appellate state court decision not to be disregarded, particularly where the highest court has refused to review).

We also disagree that *Welco* treats a statute of limitation as a meritorious defense incorrectly. Three court of appeal decisions have squarely held otherwise. *See ABA Recovery*, 244 Cal. Rptr. at 30; *Welco*, 120 Cal. Rptr. at 575; *Cleveland*, 58 P.2d at 932. *Welco* concluded that statutes of limitation are vital to the welfare of society, favored by the law, viewed as statutes of repose and as such constitute meritorious defenses. 120 Cal. Rptr. at 575 (quoting *Scheas v. Robertson*, 238 P.2d 982, 986 (Cal. 1951)). If California determines that the expiration of the statute bars a delinquent corporation's claim, we may not modify that conclusion.

C. *Equitable Tolling During NLRB Proceedings*

[5] Local 440 brought proceedings before the NLRB to establish the subsistence payments as a mandatory subject of bargaining. Involved were the same provisions challenged by Community Electric.

It asks us to extend the equitable tolling of *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980), to this case. It argues that the NLRB proceedings tolled the antitrust statute of limitation because they may affect the applicability of the nonstatutory labor exemption from the antitrust laws.

We decline to make that extension. The equitable tolling of *Mt. Hood* rested on considerations of federal

policy and primary jurisdiction not present here. *See id.* at 403. Mt. Hood, a bus company, asked the Interstate Commerce Commission to modify its approval on acquisitions by Greyhound, a competitor. *Id.* at 395. Mt. Hood later filed an antitrust suit against Greyhound. Greyhound would have argued that the acquisitions were immune had Mt. Hood sued before the ICC made the modification requested. *See Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 688 (9th Cir. 1977), *vacated*, 437 U.S. 322 (1978).

We decided that the doctrine of primary jurisdiction provides the "relevant federal procedural law to guide the decision to toll the limitations period." 616 F.2d at 403. This follows because the court could issue no injunction and award no damages until the ICC exercised its primary jurisdiction. *Id.*

Here, the NLRB proceedings did not toll the limitations period since prior resort to the Board was not a prerequisite to review in federal court. *See, e.g., Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983) (period tolled if resort to administrative body is prerequisite to court's review). When considering the nonstatutory labor exemption, courts make the determination independently. *See, e.g., California Dump Truck Owners Ass'n, Inc. v. Associated Gen. Contractors of Am., Inc.*, 562 F.2d 607, 614 (9th Cir. 1977).

D. *Due Process Claim*

Community Electric argues that the suspension of its corporate powers without actual notice resulted in a taking of its property without due process. It raised the question below in two lines of a lengthy brief without

argument or citation to authority. Since the court never ruled on it and we have no developed record to review, we decline to address the question. We have discretion to determine what questions to consider and resolve for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Quinn v. Robinson*, 783 F.2d 776, 814-15 (9th Cir.), *cert. denied*, 479 U.S. 882 (1988).

II. *The Rule 11 Motion*

A. *Standard of Review*

[6] The defendants challenge the court's denial of its Rule 11 motion. This court reviews *de novo* the legal conclusion whether specific conduct violated Rule 11. *E.g., Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986). It reviews any factual determinations by the court under a clearly erroneous standard. *Id.*

B. *Timing of the Rule 11 Motion*

Community Electric's counsel argues that summary judgment applying the statute of limitation makes the Rule 11 motion untimely. In substance, he argues that the motion forces us to address the merits.

We may address the denial of sanctions without looking too deeply into the merits of the case. *See Lemos v. Fencl*, 828 F.2d 616, 618 (9th Cir. 1987) ("It is not necessary for us to resolve the underlying legal issue in order to review the sanction award because even a petition that is correctly dismissed on its merits will not necessarily warrant sanctions.").

Community Electric's counsel also contends, somewhat inconsistently, that the defendants filed a late motion for sanctions. He asserts that they should have made the request after each allegedly frivolous pleading or before judgment.

The timeliness of the Rule 11 motion rests within the judge's discretion. *See* Advisory Committee Note of 1983 to Amended Rule 11 ("The time when sanctions are to be imposed rests in the discretion of the trial judge."). The optimum timing of sanctions to further the deterrence aspect of Rule 11 depends on the circumstances. *In re Yagman*, 796 F.2d 1165, 1184 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987). This requires discretion.

Other circuits have approached the timeliness question differently. Several have analogized the request for Rule 11 sanctions with requests for attorneys fees or costs. *See Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 604 (1st Cir. 1988) (referring to local rule on attorneys fees); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1079-80 (7th Cir. 1987) (local rule on costs and attorneys fees), *cert. dismissed*, 108 S. Ct. 1101 (1988).

The Third Circuit employs a more demanding approach that we decline to adopt. *See Mary Anne Pensiero, Inc. v. Lingle*, 847 F.2d 90, 99-100 (3d Cir. 1988) (motion required prior to entry of judgment). Although we agree with that court's concerns regarding early notification and the efficient use of judicial resources, *see Yagman*, 796 F.2d at 1184 (early notification of sanctionable behavior desirable), we believe these matters rest properly within the sound discretion of the trial judge.

The court below did not abuse its discretion. The defendants filed within 30 days of the entry of judgment, the time requires to request attorneys fees. *See* C.D. Cal. Ct. R. 16.10.

C. *Rule 11 Objective Standards*

The defendants contend that Community Electric filed several frivolous pleadings in violation of Fed. R. Civ. P. 11. The Rule states:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the *pleading, motion,* or *other paper;* that to the best of the signer's knowledge, information and belief formed after reasonable inquiry *it* is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law . . . (emphasis supplied).

This language requires us to evaluate the pleading or paper filed as a whole. *See Zaldivar v. City of Los Angeles,* 780 F.2d 823, 831 (9th Cir. 1986) ("Rule 11 sanctions shall be assessed if *the paper* filed in district court and signed by an attorney . . . is frivolous, legally unreasonable, or without factual foundation. . . .") (emphasis supplied).

This court held recently that it would not impose sanctions even where a complaint contains false allegations. *Murphy v. Business Cards Tomorrow, Inc.,* 854 F.2d 1202, 1205 (9th Cir. 1988). Citing *Golden Eagle Distrib. Corp.,* 801 F.2d at 1540. We stated that Rule 11 permits sanctions only where the pleading as a whole is frivolous. 854 F.2d at 1205. *Accord Burull v. First Nat'l Bank,* 831 F.2d 788, 789-90 (8th Cir. 1987), *cert. denied,* 108 S. Ct. 1225 (1988) (several groundless claims did not make the pleading frivolous as a whole); *In re Ruben,* 825 F.2d 977, 987

(6th Cir. 1987) (same under 42 U.S.C. § 1988), *cert. denied*, 108 S. Ct. 1108 (1988).

We appeared to limit the "frivolous as a whole" standard in *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1163 (9th Cir. 1987). Hudson, an unemployed woman over 50, requested $4.2 million in an action alleging wrongful discharge and sex discrimination. *Id.* at 1162. We said that nothing in Rule 11 prevents "an independent analysis of the prayer for relief to determine whether it is frivolous and brought for an improper purpose." *Id.* 1163. *Hudson* does not control because its holding rested on the improper purpose of the plaintiff and the harassing nature of the complaint. *See id.* We make a different examination when a party complains that a litigant interposed a pleading for an improper purpose. An entire pleading has a harassing or improper purpose if the litigant included one of the claims or allegations with that purpose. This explains the independent analysis of the prayer for relief. *See id.* Here, the defendants do not allege improper purpose.

We apply an objective standard when evaluating the pleading as a whole. We evaluate also the attorney's conduct at the time of signing. *See, e.g., Cunningham v. County of Los Angles*, 859 F.2d 705, – (9th Cir. 1988). Rule 11 requires such examination into the facts and applicable law under the circumstances of the case. *Zaldivar*, 780 F.2d at 831. A court must impose sanctions if competent counsel could not form a reasonable belief that the pleading or other paper is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. *Golden Eagle*, 801 F.2d at 1537. It follows that

sanctions are inappropriate where reasonable and competent attorneys could disagree over the existence of a good faith argument.

D. *Community Electric's Pleadings*

The defendants challenge three papers filed by Community Electric's counsel: (1) the complaint, (2) the opposition to summary judgment, and (3) the response to defendants' statement of uncontroverted facts.

1. *The Complaint and Opposition to Summary Judgment*

a. *Sherman Act Section 1 Claim*[1]

Community Electric claims that the provisions of the Inside Wiremans' Agreement violate section 1 of the Sherman Act. If reasonable and competent attorneys could disagree over the existence of a good faith argument, sanctions are inappropriate. *See Golden Eagle*, 801 F.2d at 1537.

Competent attorneys could make a good faith argument that the agreement constituted a *per se* violation of section 1. The Supreme Court has held certain economic practices so clearly anticompetitive that they are illegal *per se*. *See, e.g., Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Price-fixing is such a practice. *Id.* The Court has said:

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[1] Since we conclude that the antitrust claims in Community Electric's complaint and its opposition to summary judgment were not frivolous, we need not address the other less significant claims contained in these documents. These pleadings as a whole were not frivolous.

> [A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

There could be a good faith argument that the collective bargaining agreement had the purpose and effect of stabilizing prices. In *National Elec. Contractors Ass'n v. National Constructors Ass'n*, 678 F.2d 492, 501 (4th Cir. 1982), *cert. dismissed*, 463 U.S. 1233 (1983), the IBEW and NECA agreed to include a provision in all IBEW construction contracts requiring the employer to contribute 1% of his gross labor payroll to the National Electrical Industry Fund. The court affirmed summary judgment finding price fixing because the provision interfered with the market forces that set the price of such contracts and robbed non-NECA contractors of a competitive advantage. *Id; compare T.W. Elec. Serv., Inc. v Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 634-35 (9th Cir. 1987) (affirming summary judgment for defendants in suit involving similar provision due to insufficient evidence of conspiracy and injury to competition).

The travel/subsistence provision interferes with market forces and may stabilize the price that electrical contractors in Palm Springs charge. It permits local contractors to charge more for their contracts without the provision, knowing that non-local contractors must pay a higher rate to employees for the same services and will not successfully underprice them.

The defendants claim also that Community Electric's counsel had no objective basis to believe that the agreement injured competition. Such injury is an element of a section 1 violation under the rule of reason. *See Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1391 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). Community Electric's counsel provided the affidavit of a labor economist showing a good faith belief formed after reasonable inquiry as Rule 11 requires.

The defendants also assert that collateral estoppel after the NLRB proceeding made Community Electric's antitrust claim frivolous. They rely on the Administrative Law Judge's finding that the union (and the associated labor management committee) acted in good faith.

A finding of good faith in executing an agreement does not foreclose the possibility of an anticompetitive purpose. The inquiry regarding improper purpose is confined to a consideration of the impact of the agreement on competitive conditions. *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 690 (1978).

The defendants contend finally that Community Electric's counsel had no good faith argument that the provisions do not fall within the nonstatutory labor exemption to the antitrust laws. This exemption prevents the antitrust laws from frustrating the goal of labor law, to permit employees to organize for the improvement of wages and working conditions. *E.g., Richards v. Nielson Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987). The defendants rely on the fact that the agreement concerns employee wages.

A union imposed restraint will fall outside the exemption if it produces significant anticompetitive

effects. *Id.; see Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 602 F.2d 494, 521 (3d Cir. 1979) (requiring that agreement restrain trade no more than necessary to advance a legitimate labor goal), *vacated on other grounds*, 448 U.S. 902 (1980).

A competent attorney could argue in good faith that the agreement restrained trade more than necessary. For at least three months, a non-local contractor must pay its employees the maximum travel amount, $35 per day. This maximum continues to apply to those jobs begun during the initial three months. The defendants failed to provide a satisfactory business or labor justification for it, although we gave them several opportunities to do so at oral argument.

b. *Frivolous Parties*

The defendants argue that because Local 440 and Southern Sierras NECA were the only parties to the agreement, Community Electric's counsel joined other parties improperly.

Joining in a contract, combination or conspiracy violating section 1 does not require signing the agreement. Concerted action is enough. *See Granddad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105, 1111-12 (9th Cir. 1979) (element of prima facie case), *cert. denied*, 449 U.S. 1026 (1981).

Although this circuit evaluates the pleading as a whole, we have considered imposing sanctions for improperly naming a party in a suit. *See Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987) (denying sanctions for joining The Gap as a co-defendant). To

warrant sanctions, joining the party must be baseless or lacking in plausibility. *Id.*

Community Electric sued seven parties other than Local 440 and Southern Sierras NECA. John Gomes and Dennis Thorsen [sic] were included. They served on the labor management committee that heard disputes over the travel/subsistence provision. The committee decided unanimously against Community Electric, enforcing the terms of the agreement. This constituted direct evidence of participation in a contract, combination or conspiracy. *See Oltz v. St. Peter's Community Hosp.*, Nos. 87-3944, 87-3945, slip op. at 14571 (9th Cir. Nov. 28, 1988).

Community Electric also joined National NECA and International IBEW. The defendants argue that opposing summary judgment as to these parties was frivolous even if naming them in the complaint was not.

Although Community Electric's opposition to summary judgment presents a close question, the absence of a genuine issue of fact is not dispositive. *See Zaldivar*, 780 F.2d at 830. In *California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1467 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 699 (1988), several businesses sued a ceramic tile manufacturer under RICO for assuring them that it would continue in business. Plaintiffs alleged that it had decided to close much earlier. This court affirmed the grant of summary judgment in favor of the defendant, but reversed the award of sanctions against plaintiffs' attorney for bringing suit. *Id.* at 1472.

We concluded that Franciscan's sudden closing was circumstantial evidence of a possible undisclosed plan to close early. *Id.* The action was not baseless or lacking in

plausibility even though the defendants failed to adduce enough evidence to create a genuine issue of fact. *Id.*

We applied the same standard in *Rachel*, 831, F.2d at 1508. The plaintiff joined The Gap as a co-defendant liable for the acts of its wholly-owned subsidiary, Banana Republic. Again, the plaintiff failed to produce sufficient evidence to raise a genuine issue of fact. The defendants' letter to the plaintiff on stationery from The Gap was crucial to the determination that sanctions were not warranted. *Id.*

Applying the standard of these cases, the court denied sanctions properly. Community Electric had evidence that representatives of both National NECA and International IBEW were directly involved in responding to its challenge to the agreement. It also had evidence that NECA reviewed and approved the agreement. Even assuming the absence of a genuine issue of fact, the possibility of NECA's and IBEW's participation in the conspiracy was not so baseless or lacking in plausibility to warrant sanctions.

The defendants assert finally that joining the IBEW-NECA Pension Trust Fund, the Los Angeles NECA, and Local 11 was frivolous because those entities merely pursued their legal rights against Community Electric. It responds that these parties enforced rules against it discriminatorily because of its objections to the agreement. Since Community Electric did not mention these parties in its opposition to summary judgment, we consider only whether including them in the complaint warranted sanctions.

The relative timing of the actions against Community Electric provided enough circumstantial evidence to justify denying sanctions. *See California Architectural Bldg. Prod., Inc.*, 818 F.2d at 1472. Community Electric offered evidence that the pension trust fund threatened liens and related labor problems if it continued to work in Palm Springs. During the dispute over the provisions, Local 11 removed its men from job sites in Los Angeles ostensibly for Community Electric's failure to make its monthly contributions and reports. Similar delays had occurred in the past without this response. Finally, Los Angeles NECA failed to represent Community Electric's interests at labor management meetings and participate in decisions harassing Community Electric.

This evidence at least gave Community Electric an arguable claim. *See e.g., Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1391 (requiring (1) an agreement (2) through which the parties intend to harm or restrain competition (3) that actually injures competition); *cf. Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126, 129 (6th Cir.) (requiring evidence of discrimination or arbitrary exclusion), *cert. denied*, 449 U.S. 826 (1980).

The antitrust aspects of this case also affect our determination. We acknowledge the lenient evidentiary requirements for proving a conspiracy violating antitrust laws. Federal courts grant wide latitude in concluding conspiracy or collusion from parallel conduct and the inferences drawn from the circumstances. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (fact finder may infer agreement from evidence that tends to exclude the possibility that entities acted independently).

We grant summary judgment less frequently in the antitrust context, in part because the alleged conspirators control the proof. *See Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 683 (9th Cir.) *cert. denied*, 429 U.S. 940 (1976). This less demanding standard should also apply under Rule 11 to evaluate the associated documents.

2. *Response to the Statement of Uncontroverted Facts*

This paper addressed only factual questions. We review the court's denial of sanctions under a clearly erroneous standard. *Golden Eagle*, 801 F.2d at 1538. We find no evidence (and the defendants have indicated none) leaving us with a definite and firm conviction that the court committed a mistake. *See, e.g., Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985).

CONCLUSION

The district court properly granted summary judgment in favor of the defendants and denied their motion for Rule 11 sanctions.

AFFIRMED.

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WIGGINS, J., Concurring:

I concur in part I of the opinion and in the judgment affirming the district court. I write separately because I detect in part II of the majority opinion a tolerance of single, post-judgment motions for sanctions that accumulate all manner of perceived misdeeds occurring during

the course of the litigation. Although a rigid rule prohibiting such motions in all cases may be inappropriate, we owe a duty to the bar to tilt the district courts away from such action. The majority opinion, in my view, does not do so.

The complaint by Community Electric was filed on January 13, 1986. It alleged violations of the Sherman Act, the Racketeer Influence and Corrupt Organizations Act and several related California state law claims. The complaint was proper in form and content and no challenge was then made to it by the defendants.

The powers, rights and privileges of the plaintiff, Community Electric, had been suspended by the California Secretary of State before the filing of this lawsuit. The defendants asserted that Community Electric lacked the capacity to sue. Community Electric thereupon acted to restore its capacity, shortly before trial but after the statute of limitations had expired under California law. This sequence of events poses the issue discussed in part I of the opinion.

Nothing in defendant's arguments suggest that the plaintiff acted improperly in filing its claim and thereafter reviving its corporate powers to overcome the consequence of an earlier failure to pay corporate taxes. That we conclude that the actions of Community Electric did not save it from the defense of the statute of limitations is of no special consequence to the motion for sanctions. There is always a loser in contested litigation.

In sum, the district court concluded that the plaintiff's claim was barred by the statute of limitations and it granted defendant's motion for summary judgment.

Within 30 days thereafter, defendant moved for sanctions against the plaintiff. That motion was denied.

Under the circumstances herein set forth, I believe the district court should be affirmed because the motion for sanctions comes too late to serve its intended purpose. Accordingly, it is unnecessary to discuss at length the propriety of the court's ruling on the merits of the request for sanctions.

We considered the issue presented here – the propriety of a single post-judgment request for sanctions for various alleged acts of misconduct occurring during the pretrial and trial period – in *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986). We concluded there that such a request "flies in the face of the primary purpose of sanctions, which is to deter subsequent abuse." 796 F.2d at 1183. Deterrence, we held, is furthered by punishing the offender at the time of the transgression. *id.*

We did not hold in *Yagman* that the preference for avoiding a post-judgment lump sum claim for sanctions is an inflexible rule. But in those cases in which such a claim may be appropriate, we held that an early notice to the offending attorney that continuation of misconduct may result in a sanction is the desired procedure. *Id.* at 1184 (" . . . if the purposes of the rules are to be served, the sanctionable behavior should be brought to the immediate attention of the offending attorney.")

The majority opinion makes reference to *Matter of Yagman*. It concludes that *Yagman* holds that the timing of a sanctioned motion is committed to the sound discretion of the district court. Majority Opinion, p. 1794. The majority does not read *Yagman* as I do. I believe it stated a

strong preference for an earlier filing of a motion for sanction than occurred here.

I believe we are doing a disservice to the bench and to the bar in approving the procedure followed in this case. We should simply affirm the denial of sanctions because it appears that the motion was not timely filed.

**APPENDIX B**

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC., *Plaintiff-Appellee,* v. NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., ET AL., *Defendants-Appellants.* | Nos. 87-6280, 88-5616 & 88-5663 DC. No. CV-86-0254-RSWL AMENDED OPINION |

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
November 4, 1988 – Pasadena, California

Filed March 6, 1989
Amended April 27, 1989

Before: Eugene A. Wright, William A. Norris and Charles Wiggins, Circuit Judges.

Opinion by Judge Wright

## SUMMARY

### Courts and Procedure

Affirming the district court's grant of summary judgment, the court held that because F.R.C.P. Rule 17(b)

prevailed over antitrust law, the court was required to apply California law and time barred the complaint.

Three appeals from an antitrust suit with nine defendants were consolidated. Community Electric Service of Los Angeles, Inc. (Community Electric) filed a complaint alleging violations of the Sherman Act and other federal statutes and related California state law claims, naming as defendants several union organizations. The Franchise Tax Board had suspended Community Electric's corporate powers, rights and privileges and defendants answered the complaint claiming a lack of capacity to sue. In May, 1987, the California Secretary of state's office suspended Community electric's [sic] corporate powers, rights and privileges, but Community Electric obtained a certificate of revivor in June, 1987. The district court dismissed the case in August, 1987, holding that Community Electric lacked the capacity to file a complaint in January, 1986 due to the 1983 suspension and that reinstatement was ineffective to validate the January filing because the antitrust statute of limitation expired May, 1987, four years after Community Electric ceased doing business and before reinstatement occurred.

[1] Rejecting Community Electric's argument that federal antitrust law should prevail because of the federal interest involved, the court held that F.R. Civ. P. Rule 17(b), which provides that corporate capacity to sue is determined by the law of the state under which it was organized, prevailed over antitrust law and required the court to apply California law [2] to find that Community Electric had no capacity to sue in January 1986 because the corporations' rights, powers and privileges were suspended by the Franchise Tax Board under California law.

[3] In determining what the law is in California as to whether Community Electric may obtain retroactively the capacity to sue, [4] the court analyzed State court of appeal decisions to find that California has determined that the expiration of the statute of limitations bars a delinquent corporation's claim.

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## COUNSEL

D. William Heine, Los Angeles, California; Gary L. Lieber, Washington, D.C.; Jack R. White, Los Angeles, California, for the defendants-appellants, National Electrical Contractors Association; Elizabeth R. Lishner, Los Angeles, California, for the defendants-appellees-cross-appellants, IBEW Local Union No. 11.

Pamela Victorine, Beverly Hills, California; John P. McNicholas, Los Angeles, California, for the plaintiff-appellee, Community Electric Service.

## OPINION

WRIGHT, Circuit Judge:

This case involves the consolidation of three appeals from an antitrust suit with nine defendants. We must determine whether Community Electric Service, Inc. had the capacity to sue in federal court and whether its pleadings warrant Rule 11 sanctions.

### FACTS

Community Electric, an electrical contracting company operating in Los Angeles County, bid successfully on a Palm Springs contract in an effort to expand its business geographically. It signed a letter of assent binding it to a collective bargaining agreement between the International Brotherhood of Electrical Workers (IBEW) Local 440 and Southern Sierras National Electrical Contractor's Association, Inc. (NECA).

The IBEW Local 440 – Southern Sierras NECA agreement (termed "the Inside Wiremans' Agreement") has a provision effectively imposing a $35 per day travel/subsistence payment on non-local contractors for each employee on a job. It applies to jobs begun before the contractor has maintained a permanent place of business within the jurisdiction for 90 days.

Community Electric contends vigorously that this provision has the purpose and effect of excluding non-local contractors. It claims that the provision sets prices and makes it impossible for non-local contractors to compete on equal footing with local contractors.

Community Electric attempted dispute resolution under the terms of the agreement. A labor management committee ruled against it unanimously.

These provisions were also the subject of proceedings before the National Labor Relations Board. It held the subsistence payments a mandatory subject of bargaining and enforceable, but declined to address the antitrust implications.

Community Electric asserts that its challenges resulted in retaliatory action. Besides claiming harassment from Southern Sierras NECA and Local 440, Community Electric alleges additional harassment from their Los Angeles counterparts. It contends that Los Angeles NECA and Local 11, as well as the IBEW-NECA pension trust fund, enforced several rules discriminatorily.

On January 13, 1986, Community Electric filed a complaint alleging violations of the Sherman Act, the Racketeer Influenced and Corrupt Organizations Act (RICO),

and related California state law claims. It named as defendants the Southern Sierras and Los Angeles County Chapters of the NECA, their parent body, National NECA, Locals 11 and 440 of the IBEW, their parent body, International IBEW, two owners of electrical contracting firms from Palm Springs, John Gomes and Dennis Thorsen [sic], and the Southern California IBEW-NECA Pension Trust Fund.

On July 1, 1983, before the filing, the California Franchise Tax Board had suspended Community Electric's corporate powers, rights, and privileges. The defendants in their answer alleged Community Electric's lack of capacity to sue.

On May 28, 1987, the California Secretary of State's Office informed the defendants that Community Electric's corporate powers, rights, and privileges were suspended. The defendants notified Community Electric and on June 8 filed a request for a status conference. That day, the California Tax Franchise Board issued a certificate of revivor reinstating Community Electric's corporate powers for the purpose of pursuing this litigation.

On August 6, 1987, the court dismissed the case, holding that Community Electric lacked the capacity to file a complaint in January 1986 due to the July 1983 suspension. It also determined that the reinstatement was ineffective to validate the January filing. The antitrust statute of limitation expired May 6, 1987, four years after Community Electric ceased doing business. The June 8 reinstatement occurred too late.

After the dismissal, the defendants moved for Rule 11 sanctions. The court denied them, concluding that

neither the complaint nor Community Electric's subsequent documents violated Rule 11's "Frivolousness Clause."

Community Electric appeals the grant of summary judgment and defendants appeal the denial of their Rule 11 motion.

## DISCUSSION

### I. *Time Barring of Community Electric's Claims*

#### A. *Capacity to File Suit*

Federal Rule of Civil Procedure 17(b) provides that "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Community Electric filed before the antitrust statute of limitation (15 U.S.C. § 15b (1982)) expired. The court held it had no capacity to sue under California law, the law of the state where it incorporated. Community Electric argues that federal antitrust law should prevail because of the federal interest involved.

[1] We hold that Rule 17(b) prevails over antitrust law and requires us to apply California law. In *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987), we rejected the argument that the Comprehensive Environmental Response Compensation Liability Act of 1980 (CERCLA) prevails over 17(b). The plaintiffs sued a corporation for claims arising after its dissolution. *Id.* at 1449. As the plaintiffs in that case, Community Electric cites no authority in support of its position and other courts have held to the contrary. *See id.* at 1451.

We follow the other circuits that apply state law even when it requires dismissing an antitrust suit. *See Moore v. Matthew's Book Co.*, 597 F.2d 645, 646-47 (8th Cir. 1979); *R. V. McGinnis Theatres v. Video Indep. Theatres, Inc.*, 386 F.2d 592, 593-95 (10th Cir. 1967), *cert. denied*, 390 U.S. 1014 (1968). This follows since corporations are creatures of state law. *Cf. Cort v. Ash*, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law").

The facts of *R. V. McGinnis Theaters* parallel this case. 386 F.2d at 593-94. McGinnis sued for alleged antitrust violations. Oklahoma had revoked McGinnis' charter for failing to pay its corporate franchise tax. McGinnis relied on a later reinstatement.

The Tenth Circuit affirmed the lower court decision to dismiss. *Id.* at 594-95. The relevant statute permitted reinstatement only where payment of the tax occurs within a year of suspension and McGinnis had paid after the year expired. *Id.*

[2] Applying California law, Community Electric had no capacity to sue in January 1986. Section 23301 of the California Revenue and Tax Code provides that the Franchise Tax Board may suspend the rights, powers and privileges of a corporation for nonpayment of taxes.

A delinquent California corporation may neither bring suit nor defend a legal action. *E.g., Green v. Norman*, 309 P.2d 809, 812 (Cal. 1957). We have repeatedly acknowledged this as the law of California. *See United States v. 2.61 Acres of Land, More or Less*, 791 F.2d 666, 668 (9th Cir. 1985) (reversing refusal to grant continuance in order to enable corporation to revive itself); *cf. In re Christian & Porter Aluminum Co.*, 584 F.2d 326, 331-32 (9th

Cir. 1978) (appeal by 14 suspended California corporations dismissed). Because the Franchise Tax Board suspended Community Electric, it had no capacity to sue.

B. *Retroactive Effect of Corporate Revival*

The antitrust statute of limitation expired May 6, 1987. The Board reinstated Community Electric on June 8, 1987. Community Electric argues that this reinstatement gave it the capacity retroactively for the January filing.

[3] We apply California law to determine whether Community Electric may obtain retroactively the capacity to sue. The California statutory scheme provides for suspension under § 23301 and revival under § 23305 or § 23305b. Community Electric was revived without paying its taxes under § 23305b. Section 23305a, which applies to revival under either §§ 23305 or 23305b, states: "[u]pon the issuance of such certificate by the Franchise Tax Board the taxpayer therein named shall become reinstated but *such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture.*" (emphasis supplied).

No California Supreme Court decision has addressed the situation where the revivor issues after the statute of limitation has expired. Every California court facing this question has held that corporate reinstatement will not validate retroactively the earlier filing. These decisions conclude that the expiration of a statute of limitation qualifies as a "defense" that "has accrued."

Since we must apply California law and have no Supreme Court decision, we look to the decisions of the

intermediate state courts of appeal. *See, e.g., Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 735 (9th Cir. 1986) (applying California law to breach of contract claims). We follow the decision of a state court of appeal unless convincing evidence exists that the state supreme court would decide the issue differently. *Id.*

The court below specifically relied on *Welco Constr., Inc. v. Modulux, Inc.*, 120 Cal. Rptr. 572, 573 (Ct. App.), *cert. denied*, 120 Cal. Rptr. 572 (1975). Welco had filed a complaint after suspension of its corporate status. Modulux answered, but did not challenge Welco's standing to prosecute until the day of trial. Welco obtained a certificate of revivor on that day. The trial court permitted Modulux to amend its answer to plead the statutes of limitations and granted a judgment of nonsuit.

The court of appeal affirmed, applying the language of § 23305a. *Id.* at 574-75. It concluded that prior California decisions distinguish a plea in abatement from a defense. Facts warranting a plea in abatement must exist at the time of the plea and corporate revivor will validate retroactively the acts abated. In contrast, a statute of limitations is a defense and the revivor will not validate a prior filing of suit. *Id.*

Recently another California court of appeal reaffirmed the holding in *Welco* and the California Supreme Court denied review, as it had for *Welco*. *See ABA Recovery Serv., Inc. v. Konold*, 244 Cal. Rptr. 27, 30 (Ct. App. 1988). Although *ABA Recovery* involved a separate statute of limitation, the court applied the *Welco* analysis and reached the same result. *See id.; accord Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.*, 176 Cal. Rptr.

239, 245 (Ct. App. 1981) (revival of a corporation cannot prejudice a statute of limitations defense that accrues during suspension of its powers).

Community Electric says that *Welco* does not represent California law or does not apply to this suit. First, it argues that corporate revival validates retroactively all prior acts undertaken during periods of suspension, even after accrual of a defense. Second, it argues that *Welco* treats a statute of limitation as a meritorious defense incorrectly.

Community Electric provides no persuasive reason for treating the antitrust statute of limitation differently than those involved in *Welco* and *ABA Recovery*. Both cases dealt with the argument that corporate revival validates retroactively all prior acts undertaken during periods of suspension. Both rejected the argument, relying on *Traub Co. v. Coffee Break Serv., Inc.*, 57 Cal. Rptr. 846, 848 (1967). The court in *Traub* allowed a revivor to validate a judgment obtained during suspension, but distinguished *Cleveland v. Gore Bros., Inc.*, 58 P.2d 931 (Cal. Ct. App. 1936), as "present[ing] a statute of limitations problem." 57 Cal. Rptr. at 848.

Community Electric cites no authority that convinces us that the California Supreme Court has changed its position since *Traub*. This seems true where, as here, the Court had a recent opportunity to address the issue but avoided it. *See Tenneco West, Inc. v. Marathon Oil Co.*, 756 F.2d 769, 771 (9th Cir.), *cert. denied*, 474 U.S. 845 (1985) (intermediate appellate state court decision not to be disregarded, particularly where the highest court has refused to review).

[4] We also disagree that *Welco* treats a statute of limitation as a meritorious defense incorrectly. Three court of appeal decisions have squarely held otherwise. *See ABA Recovery*, 244 Cal. Rptr. at 30; *Welco*, 120 Cal. Rptr. at 575; *Cleveland*, 58 P.2d at 932. *Welco* concluded that statutes of limitation are vital to the welfare of society, favored by the law, viewed as statutes of repose and as such constitute meritorious defenses, 120 Cal. Rptr. at 575 (quoting *Scheas v. Robertson*, 238 P.2d 982, 986 (Cal. 1951)). If California determines that the expiration of the statute bars a delinquent corporation's claim, we may not modify that conclusion.

C. *Equitable Tolling During NLRB Proceedings*

Local 440 brought proceedings before the NLRB to establish the subsistence payments as a mandatory subject of bargaining. Involved were the same provisions challenged by Community Electric.

It asks us to extend the equitable tolling of *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980), to this case. It argues that the NLRB proceedings tolled the antitrust statute of limitation because they may affect the applicability of the nonstatutory labor exemption from the antitrust laws.

We decline to make that extension. The equitable tolling of *Mt. Hood* rested on considerations of federal policy and primary jurisdiction not present here. *See id.* at 403. Mt. Hood, a bus company, asked the Interstate Commerce Commission to modify its approval on acquisitions by Greyhound, a competitor. *Id.* at 395. Mt. Hood later filed an antitrust suit against Greyhound. Greyhound

would have argued that the acquisitions were immune had Mt. Hood sued before the ICC made the modification requested. *See Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 688 (9th Cir. 1977), *vacated*, 437 U.S. 322 (1978).

We decided that the doctrine of primary jurisdiction provides the "relevant federal procedural law to guide the decision to toll the limitations period." 616 F.2d at 403. This follows because the court could issue no injunction and award no damages until the ICC exercised its primary jurisdiction. *Id.*

Here, the NLRB proceedings did not toll the limitations period since prior resort to the Board was not a prerequisite to review in federal court. *See, e.g., Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983) (period tolled if resort to administrative body is prerequisite to court's review). When considering the nonstatutory labor exemption, courts make the determination independently. *See, e.g., California Dump Truck Owners Ass'n, Inc. v. Associated Gen. Contractors of Am., Inc.*, 562 F.2d 607, 614 (9th Cir. 1977).

D. *Due Process Claim*

Community Electric argues that the suspension of its corporate powers without actual notice resulted in a taking of its property without due process. It raised the question below in two lines of a lengthy brief without argument or citation to authority. Since the court never ruled on it and we have no developed record to review, we decline to address the question. We have discretion to determine what questions to consider and resolve for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106,

120-21 (1976); *Quinn v. Robinson*, 783 F.2d 776, 814-15 (9th Cir.), *cert. denied*, 479 U.S. 882 (1988).

II. *The Rule 11 Motion*

A. *Standard of Review*

The defendants challenge the court's denial of its Rule 11 motion. This court reviews *de novo* the legal conclusion whether specific conduct violated Rule 11. *E.g., Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986). It reviews any factual determinations by the court under a clearly erroneous standard. *Id.*

B. *Timing of the Rule 11 Motion*

Community Electric's counsel argues that summary judgment applying the statute of limitation makes the Rule 11 motion untimely. In substance, he argues that the motion forces us to address the merits.

We may address the denial of sanctions without looking too deeply into the merits of the case. *See Lemos v. Fencl*, 828 F.2d 616, 618 (9th Cir. 1987) ("It is not necessary for us to resolve the underlying legal issue in order to review the sanction award because even a petition that is correctly dismissed on its merits will not necessarily warrant sanctions.").

Community Electric's counsel also contends, somewhat inconsistently, that the defendants filed a late motion for sanctions. He asserts that they should have made the request after each allegedly frivolous pleading or before judgment.

The timeliness of the Rule 11 motion rests within the judge's discretion. *See* Advisory Committee Note of 1983 to Amended Rule 11 ("The time when sanctions are to be imposed rests in the discretion of the trial judge."). The optimum timing of sanctions to further the deterrence aspect of Rule 11 depends on the circumstances. *In re Yagman*, 796 F.2d 1165, 1184 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987). This requires discretion.

Other circuits have approached the timeliness question differently. Several have analogized the request for Rule 11 sanctions with requests for attorneys fees or costs. *See Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 604 (1st Cir. 1988) (referring to local rule on attorneys fees); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1079-80 (7th Cir. 1987) (local rule on costs and attorneys fees), *cert. dismissed*, 108 S. Ct. 1101 (1988).

The Third Circuit employs a more demanding approach that we decline to adopt. *See Mary Anne Pensiero, Inc. v. Lingle*, 847 F.2d 90, 99-100 (3d Cir. 1988) (motion required prior to entry of judgment). Although we agree with that court's concerns regarding early notification and the efficient use of judicial resources, *see Yagman*, 796 F.2d at 1184 (early notification of sanctionable behavior desirable), we believe these matters rest properly within the sound discretion of the trial judge.

The court below did not abuse its discretion. The defendants filed within 30 days of the entry of judgment, the time required to request attorneys fees. *See* C.D. Cal. Ct. R. 16.10.

C. *Rule 11 Objective Standards*

The defendants contend that Community Electric filed several frivolous pleadings in violation of Fed. R. Civ. P. 11. The Rule states:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the *pleading, motion,* or *other paper,* that to the best of the signer's knowledge, information and belief formed after reasonable inquiry *it* is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law . . . (emphasis supplied).

This language requires us to evaluate the pleading or paper filed as a whole. *See Zaldivar v. City of Los Angeles,* 780 F.2d 823, 831 (9th Cir. 1986) ("Rule 11 sanctions shall be assessed if *the paper* filed in district court and signed by an attorney . . . is frivolous, legally unreasonable, or without factual foundation. . . .") (emphasis supplied).

This court held recently that it would not impose sanctions even where a complaint contains false allegations. *Murphy v. Business Cards Tomorrow, Inc.,* 854 F.2d 1202, 1205 (9th Cir. 1988). Citing *Golden Eagle Distrib. Corp.,* 801 F.2d at 1540, we stated that Rule 11 permits sanctions only where the pleading as a whole is frivolous. 854 F.2d at 1205. *Accord Burull v. First Nat'l Bank,* 831 F.2d 788, 789-90 (8th Cir. 1987), *cert. denied,* 108 S. Ct. 1225 (1988) (several groundless claims did not make the pleading frivolous as a whole); *In re Ruben,* 825 F.2d 977, 987 (6th Cir. 1987) (same under 42 U.S.C. § 1988), *cert. denied,* 108 S. Ct. 1108 (1988).

We appeared to limit the "frivolous as a whole" standard in *Hudson v. Moore Business Forms, Inc.,* 836 F.2d

1156, 1163 (9th Cir. 1987). Hudson, an unemployed woman over 50, sued her former employer and others in an action alleging wrongful discharge and sex discrimination. *See id.* at 1157, 1162-63. The employer, Moore Business Forms, Inc., filed an answer and counterclaim that alleged tortious conduct by Hudson in connection with her discharge, and requested $200,000 in compensatory damages, and $4 million in punitive damages, costs and attorney's fees. *Id.* at 1157. We said that nothing in Rule 11 prevents "an independent analysis of the prayer for relief to determine whether it is frivolous and brought for an improper purpose." *Id.* at 1163. *Hudson* does not control because its holding rested on the improper purpose of the employer and the harassing nature of the counterclaim. *See id.* We make a different examination when a party complains that a litigant interposed a pleading for an improper purpose. An entire pleading has a harassing or improper purpose if the litigant included one of the claims or allegations with that purpose. This explains the independent analysis of the prayer for relief. *See id.* Here, the defendants do not allege improper purpose.

We apply an objective standard when evaluating the pleading as a whole. We evaluate also the attorney's conduct at the time of signing. *See, e.g., Cunningham v. County of Los Angeles,* 859 F.2d 705, 714 (9th Cir. 1988). Rule 11 requires such examination into the facts and applicable law warranted under the circumstances of the case. *Zaldivar,* 780 F.2d at 831. A court must impose sanctions if competent counsel could not form a reasonable belief that the pleading or other paper is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. *Golden*

*Eagle*, 801 F.2d at 1537. It follows that sanctions are inappropriate where reasonable and competent attorneys could disagree over the existence of a good faith argument.

D. *Community Electric's Pleadings*

The defendants challenge three papers filed by Community Electric's counsel: (1) the complaint, (2) the opposition to summary judgment, and (3) the response to defendants' statement of uncontroverted facts.

1. *The Complaint and Opposition to Summary Judgment*

a. *Sherman Act Section 1 Claim*[1]

Community Electric claims that the provisions of the Inside Wiremans' Agreement violate section 1 of the Sherman Act. If reasonable and competent attorneys could disagree over the existence of a good faith argument, sanctions are inappropriate. *See Golden Eagle*, 801 F.2d at 1537.

Competent attorneys could make a good faith argument that the agreement constituted a *per se* violation of section 1. The Supreme Court has held certain economic practices so clearly anticompetitive that they are illegal *per se*. *See, e.g., Northern Pac. Ry. Co. v. United States*, 356

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[1] Since we conclude that the antitrust claims in Community Electric's complaint and its opposition to summary judgment were not frivolous, we need not address the other less significant claims contained in these documents. These pleadings as a whole were not frivolous.

U.S. 1, 5 (1958). Price fixing is such a practice. *Id.* The Court has said:

> [A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

There could be a good faith argument that the collective bargaining agreement had the purpose and effect of stabilizing prices. In *National Elec. Contractors Ass'n v. National Constructors Ass'n*, 678 F.2d 492, 501 (4th Cir. 1982), *cert. dismissed*, 463 U.S. 1233 (1983), the IBEW and NECA agreed to include a provision in all IBEW construction contracts requiring the employer to contribute 1% of his gross labor payroll to the National Electrical Industry Fund. The court affirmed summary judgment finding price fixing because the provision interfered with market forces that set the price of such contracts and robbed non-NECA contractors of a competitive advantage. *Id.; compare T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 634-35 (9th Cir. 1987) (affirming summary judgment for defendants in suit involving similar provision due to insufficient evidence of conspiracy and injury to competition).

The travel/subsistence provision interferes with market forces and may stabilize the price that electrical contractors in Palm Springs charge. It permits local contractors to charge more for their contracts than without the provision, knowing that non-local contractors must pay a higher rate to employees for the same services and will not successfully underprice them.

The defendants claim also that Community Electric's counsel had no objective basis to believe that the agreement injured competition. Such injury is an element of a section 1 violation under the rule of reason. *See Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1391 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). Community Electric's counsel provided the affidavit of a labor economist, showing a good faith belief formed after reasonable inquiry as Rule 11 requires.

The defendants also assert that collateral estoppel after the NLRB proceeding made Community Electric's antitrust claim frivolous. They rely on the Administrative Law Judge's finding that the union (and the associated labor management committee) acted in good faith.

A finding of good faith in executing an agreement does not foreclose the possibility of an anticompetitive purpose. The inquiry regarding improper purpose is confined to a consideration of the impact of the agreement on competitive conditions. *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 690 (1978).

The defendants contend finally that Community Electric's counsel had no good faith argument that the provisions do not fall within the nonstatutory labor exemption to the antitrust laws. This exemption prevents the antitrust laws from frustrating the goal of labor law, to permit employees to organize for the improvement of wages and working conditions. *E.g., Richards v. Nielson Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987). The defendants rely on the fact that the agreement concerns employee wages.

A union imposed restraint will fall outside the exemption if it produces significant anticompetitive

effects, *Id.*; *see Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 602 F.2d 494, 521 (3d Cir. 1979) (requiring that agreement restrain trade no more than necessary to advance a legitimate labor goal), *vacated on other grounds*, 448 U.S. 902 (1980).

A competent attorney could argue in good faith that the agreement restrained trade more than necessary. For at least three months, a non-local contractor must pay its employees the maximum travel amount, $35 per day. This maximum continues to apply to those jobs begun during the initial three months. The defendants failed to provide a satisfactory business or labor justification for it, although we gave them several opportunities to do so at oral argument.

b. *Frivolous Parties*

The defendants argue that because Local 440 and Southern Sierras NECA were the only parties to the agreement, Community Electric's counsel joined other parties improperly.

Joining in a contract, combination or conspiracy violating section 1 does not require signing the agreement. Concerted action is enough. *See Granddad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105, 1111-12 (9th Cir. 1979) (element of prima facie case), *cert. denied*, 449 U.S. 1026 (1981).

Although this circuit evaluates the pleading as a whole, we have considered imposing sanctions for improperly naming a party in a suit. *See Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987) (denying

sanctions for joining The Gap as a co-defendant). To warrant sanctions, joining the party must be baseless or lacking in plausibility. *Id.*

Community Electric sued seven parties other than Local 440 and Southern Sierras NECA. John Gomes and Dennis Thorsen [sic] were included. They served on the labor management committee that heard disputes over the travel/subsistence provision. The committee decided unanimously against Community Electric, enforcing the terms of the agreement. This constituted direct evidence of participation in a contract, combination or conspiracy. *See Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1451 (9th Cir. 1988).

Community Electric also joined National NECA and International IBEW. The defendants argue that opposing summary judgment as to these parties was frivolous even if naming them in the complaint was not.

Although Community Electric's opposition to summary judgment presents a close question, the absence of a genuine issue of fact is not dispositive. *See Zaldivar*, 780 F.2d at 830. In *California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1467 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 699 (1988), several businesses sued a ceramic tile manufacturer under RICO for assuring them that it would continue in business. Plaintiffs alleged that it had decided to close much earlier. This court affirmed the grant of summary judgment in favor of the defendant, but reversed the award of sanctions against plaintiffs' attorney for bringing suit. *Id.* at 1472.

We concluded that Franciscan's sudden closing was circumstantial evidence of a possible undisclosed plan to

close early. *Id.* The action was not baseless or lacking in plausibility even though the defendants failed to adduce enough evidence to create a genuine issue of fact. *Id.*

We applied the same standard in *Rachel*, 831 F.2d at 1508. The plaintiff joined The Gap as a co-defendant liable for the acts of its wholly-owned subsidiary, Banana Republic. Again, the plaintiff failed to produce sufficient evidence to raise a genuine issue of fact. The defendants' letter to the plaintiff on stationery from The Gap was crucial to the determination that sanctions were not warranted. *Id.*

Applying the standard of these cases, the court denied sanctions properly. Community Electric had evidence that representatives of both National NECA and International IBEW were directly involved in responding to its challenge to the agreement. It also had evidence that NECA reviewed and approved the agreement. Even assuming the absence of a genuine issue of fact, the possibility of NECA's and IBEW's participation in the conspiracy was not so baseless or lacking in plausibility to warrant sanctions.

The defendants assert finally that joining the IBEW-NECA Pension Trust Fund, the Los Angeles NECA, and Local 11 was frivolous because those entities merely pursued their legal rights against Community Electric. It responds that these parties enforced rules against it discriminatorily because of its objections to the agreement. Since Community Electric did not mention these parties in its opposition to summary judgment, we consider only whether including them in the complaint warranted sanctions.

The relative timing of the actions against Community Electric provided enough circumstantial evidence to justify denying sanctions. *See California Architectural Bldg. Prod., Inc.*, 818 F.2d at 1472. Community Electric offered evidence that the pension trust fund threatened liens and related labor problems if it continued to work in Palm Springs. During the dispute over the provisions, Local 11 removed its men from job sites in Los Angeles ostensibly for Community Electric's failure to make its monthly contributions and reports. Similar delays had occurred in the past without this response. Finally, Los Angeles NECA failed to represent Community Electric's interests at labor management meetings and participated in decisions harassing Community Electric.

This evidence at least gave Community Electric an arguable claim. *See, e.g., Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1391 (requiring (1) an agreement (2) through which the parties intend to harm or restrain competition (3) that actually injures competition); *cf. Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126, 129 (6th Cir.) (requiring evidence of discrimination or arbitrary exclusion), *cert. denied*, 449 U.S. 826 (1980).

The antitrust aspects of this case also affect our determination. We acknowledge the lenient evidentiary requirements for proving a conspiracy violating antitrust laws. Federal courts grant wide latitude in concluding conspiracy or collusion from parallel conduct and the inferences drawn from the circumstances. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (fact finder may infer agreement from evidence that tends to exclude the possibility that entities acted independently).

We grant summary judgment less frequently in the antitrust context, in part because the alleged conspirators control the proof. *See Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 683 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976). This less demanding standard should also apply under Rule 11 to evaluate the associated documents.

2. *Response to the Statement of Uncontroverted Facts*

This paper addressed only factual questions. We review the court's denial of sanctions under a clearly erroneous standard. *Golden Eagle*, 801 F.2d at 1538. We find no evidence (and the defendants have indicated none) leaving us with a definite and firm conviction that the court committed a mistake. *See, e.g., Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985).

CONCLUSION

The district court properly granted summary judgment in favor of the defendants and denied their motion for Rule 11 sanctions.

AFFIRMED.

**APPENDIX C**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC., *Plaintiff-Appellee,* vs. NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., et al. *Defendants-Appellants,* | Nos. 87-6280, 88-5616 & 88-5663 DC# CV-86-0254-RSWL ORDER |

(Filed April 27, 1989)

Before: WRIGHT, NORRIS, and WIGGINS, Circuit Judges.

The panel has voted unamiously to deny the petition for rehearing, and Judges Norris and Wiggins have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

## APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC., *Plaintiff-Appellee,* vs. NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., et al. *Defendants-Appellants,* | Nos. 87-6280, 88-5616 & 88-5663 DC# CV-86-0254-RSWL ORDER |

(Filed May 10, 1989)

Before: WRIGHT, NORRIS, and WIGGINS, Circuit Judges.

The amended opinion filed April 27, 1989 is corrected to include Judge Wiggins special concurring opinion filed March 6, 1989 which was inadvertently omitted from the amended opinion.

## APPENDIX E

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC., *Plaintiff,* vs. NATIONAL ELECTRICAL CONTRACTOR'S ASSOCIATION, INC., etc., et al., *Defendants.* | No. CV 86-0254 WJR (Mcx)<br>AFFIDAVIT OF DONALD L. MARTIN IN SUPPORT OF PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT<br>Date: May 18, 1987<br>Time: 10:00 a.m.<br>Place: Courtroom of the Honorable William J. Rea |

I, DONALD L. MARTIN, declare as follows:

1. I am an economist and Vice President at Glassman-Oliver Economic Consultants, Inc., Washington, D.C. I received my Ph.D. in Economics in 1969 from the University of California at Los Angeles. I received an M.B.A.

from the City University of New York in 1964, and a B.S. from Boston University in 1961.

2. My prior employment history as an economist is as follows. From 1980 to 1981, I was a Senior Consultant with National Economic Research Associates, Inc. From 1975 to 1980, I served as Research Professor of Economics at the Law and Economics Center, University of Miami Law School. From 1968 through 1975, I was an Assistant and Associate Professor of Economics in the Department of Economics at the University of Virginia.

3. In addition, I have held the following positions: Senior Advisor to the Reagan-Bush Transition Team on the Federal Trade Commission (1980); Adjunct Professor of Economics, Law and Economics Center, University of Miami (1980); Senior Economist, Network Inquiry Special Staff, Federal Communications Commission (1978-1980); Visiting Professor of Industrial Relations, Graduate School of Business, University of Chicago (1977); National Economics Fellow, Hoover Institution, Stanford University (1974); and National Science Foundation Grant Recipient, Erasmus University, Netherlands (1972).

4. I have also written numerous professional books and articles on labor unions, labor markets and antitrust topics. I have reviewed the *Vitae* attached to this affidavit and certify that it is true and correct.

5. My specific professional experience relevant to this matter includes expert witness preparation, testimony, depositions and affidavits in five antitrust cases involving market definition and other antitrust issues; testimony before the Joint Economic Committee of the

U.S. Congress on antitrust policy; professional publications concerning the measurement of monopoly power, consulting services supplied to the Federal Trade Commission relevant to investigations of union-antitrust matters; and extensive graduate teaching experience involving labor economics, industrial organization and antitrust economics.

6. In preparation for this affidavit, I reviewed descriptive and analytical material on the electrical contracting industry, declarations, affidavits, depositions and motions of the relevant parties, the Inside Wireman's Agreements of Local 440 over the period 1975-1986, and the Inside Wireman's Agreements of 24 other California IBEW locals. I also relied upon general principles of economics, and the economic literature on labor unions, industrial organization, and antitrust. My opinions and beliefs are based upon this information, and upon my background, experience and training as an economist.

## I. *THE ECONOMICS OF ANTICOMPETITIVE UNIONS AND THE LABOR EXEMPTIONS*

7. Until relatively recently, much of the labor economics and industrial relations literature devoted to collective bargaining has characterized union-employer relationships as adversarial. However, there has been a growing interest among scholars and jurists in examining the shared circumstances and incentives that cause the parties to a collective agreement to engage in decidedly more cooperative behavior. Under certain conditions cooperation may be expressed in collective bargaining agreements that work to cartelize the product market.

Unions and their employers are in vertical relationship to one another. By adopting policies to maximize *joint* profits, they may enjoy gains unavailable from adversarial behavior. Such gains are then shared according to a formula embodied in the collective agreement.

8. The lessening of product market competition may take the forms of price fixing, market division, raising rivals' costs (non-price predation) or otherwise erecting entry barriers beneficial to those within them. In such circumstances consumers and certain competitors or potential competitors are harmed and resources are allocated inefficiently, thereby indirectly harming society as a whole.

9. Whatever the form, the cooperative cartel model implies that specific elements of the collective bargaining agreement (or, alternatively, specific elements of an informal understanding between labor and management) represent necessary conditions to the success of the parties' anticompetitive goals. In other words, without the cooperation of the union, employers would not be in a position to realize the fruits of anticompetitive behavior, other things the same.

10. Economic theory does not limit union complicity in anticompetitive outcomes in the product market to collusion between management and labor. It is well known and widely supported that under certain conditions unions may act *unilaterally,* but purposefully, to create anticompetitive conditions in the product markets in which they have collective bargaining agreements. The resulting monopoly rents may then be appropriated

through higher wage rates, fringe benefits, better working conditions or a combination of all three.

11. However, the more bargaining power possessed by employers (for example, through employer bargaining groups), the less chance the given union will have to realize all of the supra-competitive returns. Thus, organized bargaining power possessed by employers in the presence of union-derived restraints on competition in the product market will usually imply cooperation between both collective bargaining parties. Whether unilateral or not, restraints on competition in the product market harm consumers, misallocate resources and may exclude efficient competitors.

12. There are, of course, situations where unilateral action by a union may indirectly or even inadvertently create market power for employers in the product market, while it satisfies some other union interest. Employers may benefit from the phenomenon, but only at the expense of consumers and competitors who are disadvantaged in the process of entry.

13. Public policy toward labor unions is acknowledged in the labor exemptions (statutory and non-statutory) to the U.S. antitrust laws. Despite anticompetitive consequences, the public interest may be served by unions pursuing legitimate union goals. Thus, not all union behavior resulting in the lessening of competition in the product market, in the raising of prices to consumers or in competitive harm to given classes of firms has been subject to antitrust liability penalties. These labor exemptions reflect a presumption that the losses to society incurred from the sacrifice of competition are

more than compensated by the furthering of legitimate union goals, consistent with public policy.

14. It follows then that where such goals may be achieved *without* sacrificing competition and *without* additional costs of comparable magnitude, invoking and enforcing the labor exemptions are counter to the public interest. Society would be better off, in such circumstances, if unions were encouraged to adopt viable and less anticompetitive methods of achieving union goals. Withholding the labor exemption in such cases raises the costs of (otherwise avoidable) anticompetitive consequences and encourages the particular union and its employers to adopt practices more in line with public policy and the public interest.

## II. *CONCLUSIONS*

15. If we apply the above models and public interest criteria to the evidence in this matter, the following conclusions may be drawn:

### A. *Raising Entry Barriers and Dividing Markets*

16. Given the relevant markets identified below, Local 440's Inside Wireman's Agreement (1981-1982) with Southern Sierras NECA operates to raise entry barriers for non-local electrical contractors attempting to compete in Local 440's jurisdiction. The Agreement also operates to divide the Riverside County trading area among incumbent electrical contractors into smaller markets, each with its own entry barrier. These types of activities on their face virtually always have the effect of restricting

competition and decreasing output in the affected markets.

17. A principal function of Sections 2.07 and 2.08 of the Agreement is to operate as an entry barrier to all non-recognized contractors who wish to do business within 440's jurisdiction beyond the "free zone" surrounding the post office at Riverside City. New entrants responding quickly to a bid opportunity within the 440 jurisdiction face significantly higher costs because of Section 2.07 than do "recognized" local contractors located beyond the Riverside City "free zone." New entrants under less urgent time constraints also face higher costs in bidding a given job than do incumbent "recognized" shops. This follows because union recognition requires the rental or ownership, furnishment and manning of "permanent" premises at least 90 days before commencing work (and perhaps even before bidding work), often with no ready income to offset expenses.

18. Significantly, even though employees customarily are not dispatched to the job site from the employer's shop, Section 3.20 of the Agreement bases "subsistence" payments to employees on a formula that penalizes the employer as a function of the distance between the job site and the employer's permanent shop location. This rule functions as a market division scheme for electrical contractors operating within 440's jurisdiction. The market division scheme is furthered by a system of "free zones" that favor "local" shops over non-local shops situated within 440's jurisdiction. The market division scheme, by definition, creates barriers which effectively restrain *interdivisional* competition and is enforced by Section 2.07 discussed below.

B. *Labor-Management Committee Enforces the Anticompetitive Agreement*

19. When disputes arise, enforcement of Sections 2.07, 2.08 and 3.20 is the responsibility of a labor-management committee comprised of union representatives and incumbent electrical contractors who stand to gain by market division schemes, entry barriers and the raising of new rivals' costs. New entrants may face unit labor costs as much as 15 percent higher than incumbents' costs (based on estimates from "labor burden" calculations), which, at that margin, may mean the difference between winning and losing bids.

C. *Harm to Plaintiff*

20. The application of Sections 2.07, 2.08 and 3.20 of the Agreement has brought anticompetitive harm to the Plaintiff by significantly disadvantaging it in bidding on contracts in the Palm Springs area as well as other Riverside County areas, and ultimately causing it to withdraw from doing business within 440's jurisdiction.

D. *Harm to Competition*

21. Enforcement of Sections 2.07, 2.08 and 3.20 of the Agreement has suppressed competition in the market by discouraging entry in areas where barriers are higher (Palm Springs Desert area) relative to where barriers are less severe (e.g., within the Riverside "free zone"). It has also discouraged recognized contractors from entering areas beyond their free zone. Indeed, it has discouraged entry into the jurisdiction of Local 440 generally, to the

detriment of consumers of electrical contracting services who live and work there.

22. Based on my analysis of Inside Wireman's Agreements of all other IBEW locals in California, it is my judgment that legitimate union goals of employer recognition and subsistence payments to union members may be easily realized without the use of the anticompetitive clauses of Sections 2.07, 2.08 and 3.20 employed in the Agreement. Indeed, Local 440's new Inside Wireman's Agreement (1986-1989) is proof of this observation. As a result, I conclude that the 1981-1982 Agreement promoted anticompetitive effects beyond the public interest served by the labor exemptions.

## III. *RELEVANT MATTERS*

23. The harm to competition and the Plaintiff occurred within the context of a relevant product market and a relevant geographic market.

### A. *Relevant Product Market*

24. Electrical contracting services cover a wide variety of activities from the sale, installation and maintenance of electrical equipment in residential, commercial and industrial buildings to the supply and installation of traffic lights, street lamps and other public outdoor electrical operations. Although very large electrical contractors bid on both inside and outside jobs, more frequently contractors specialize their business to one or the other. Electrical contracting services may be sold *directly* to final

consumers or sold to general contractors under subcontracting arrangements. As a rule, other than very small jobs, electrical contracting services supplied to new residential, commercial and industrial construction projects are subcontracted by general contractors. Electrical subcontracting costs have been estimated to represent approximately 10 percent of the costs of projects associated with general contracting services.

25. "Open shop" general contracting did not become a significant phenomenon in Riverside County and contiguous county areas until after 1983. General contractors that were all non-union were also rare, outside of residential construction. Therefore, a general contractor, under union agreement with other trades, would face serious labor problems if it substituted a non-union electrical subcontractor for a union electrical subcontractor (i.e., a non-union shop for a union shop). Moreover, as mentioned above, electrical contracting represented a relatively small fraction of total construction costs. As a result, competition from non-union firms was not a significant threat to union shop electrical contractors in Riverside County and counties contiguous to it before 1984. This observation is consistent with the fact that 85 percent of the electrical contracting in the Palm Springs area in 1981 was under union contract (Thomas Brady Deposition, pp. 12-13). That statistic had dropped to between 50 and 40 percent by 1984 (Brady Deposition, pp. 12-13, a true and correct copy of which is attached as Exhibit 1.)

26. These considerations strongly suggest that the relevant product market for antitrust concerns is union shop electrical contracting services to union contractors on residential, commercial and industrial construction

projects. Residential electrical contracting requires fewer skills, less experience and perhaps a less substantial reputation than commercial and industrial electrical contracting. Therefore, there may be some justification in distinguishing residential electrical contracting from commercial/industrial electrical contracting services, the larger the size of the job. This distinction is made among electrical contractors, the IBEW and in statistical analyses of the electrical contracting industry compiled by sources such as NECA.

B. *Geographic Market*

27. Reference to contractor reporting services such as the *Dodge Daily Construction Reports* (McGraw Hill Publications), NECA surveys and the Fails Management Institute reveal that most electrical contractors do not leave the state where they are headquartered to do business. Moreover, a close examination of the *Dodge Daily Construction Reports* for 1981 shows that most electrical contractors bidding on jobs in, for example, the Orange County area (information was only available for public construction projects) were headquartered within the surrounding contiguous counties or thereby. These observations are consistent with descriptions of his search activities made by deponent John Gomes. "[W]e've been bidding in five counties for a 10 year period prior to '81 [and subsequently]." (Gomes Deposition, pp. 32-34, a true and correct copy of which is attached hereto as Exhibit 2.)

28. In the absence of the recognition and subsistence clauses of the Agreement discussed below, the relevant geographic market for antitrust purposes is not

likely to be greater than the contiguous counties surrounding Riverside County or Local 440's jurisdiction. However, with access to daily construction reporting services, excellent roads and an available supply of skilled labor, a small, but significant, non-transitory increase in competitive bid prices may reveal that the relevant geographic market includes most of Southern California. Nevertheless, examination of the *Dodge Reports* for counties closer to Riverside failed to reveal significant representation from more remote areas.

29. Further refinement is necessary once the *recognition* and *subsistence* clauses of the Agreement are introduced. The relevant market is artificially constrained in that electrical contractors domiciled within 440's jurisdiction may freely bid (except for San Bernardino County [Local 477 and Southern Sierras NECA's jurisdictions] where similar barriers apply) for jobs in other counties, but outsiders are burdened with an additional cost if they choose to perform any work outside of the Riverside "free zone." All other entrants to Local 440's jursidiction and to the area covered by Southern Sierras' NECA Riverside Division are burdened relative to incumbents. The effect is to create a separate geographic market for most of Riverside county.

30. As discussed above, subsistence burdens and recognition costs to outsiders can amount to approximately 15 percent of unit labor costs. A small, but significant, non-transitory increase in bid prices by contractors within the smaller market would not likely cause entry by those familiar with the Agreement. However, insulation from outside competition without a market division

or price fixing scheme does not protect locally-based electrical contractors from competition from within.

## IV. *THE AGREEMENT SUBSTANTIALLY LESSENS COMPETITION IN LOCAL 440'S JURISDICTION*

### A. *The Agreement's Anticompetitive Clauses*

31. The Inside Wireman's Agreement relevant to this matter is virtually identical, in topics covered, to the other 24 California Inside Wireman's Agreements I have studied. All discuss administrative procedures, employer and union rights, wages per hour a[illegible] working conditions, referral procedures, apprenticeship and training, fringe benefits and safety. However, only the Agreements with *Local 440* and *Local 477* (both signatories with Southern Sierra's NECA) contain employer recognition clauses and employee subsistence clauses that clearly and arbitrarily disadvantage new entrants to the union's jurisdiction, respectively. Moreover, only these two Agreements have clauses that effectively produce a mechanism for market division within the union's jurisdiction, respectively.

32. Section 2.07 of the NECA Inside Wireman's Agreement with Local 440 provides for the *recognition* of an employer's *permanent* place of business within the jurisdiction, as a *local* shop. Such recognized local shops are allowed certain pecuniary privileges, discussed below, vis-a-vis other recognized local shops located in other parts of the 440 jurisdiction and via-a-vis other employers with no actual *permanent* place of business within the jurisdiction. However, before these privileges

may be enjoyed, a new contractor must satisfy two criteria. First, he must be found in compliance with Section 2.08 of the Agreement containing the union's definition of a permanent place of business. Second, he must wait a "minimum of 90 days" before his new status is *recognized* by the union.

33. Section 2.07 makes it clear that should recognition be bestowed on the new contractor after he had commenced working on the job, all said pecuniary privileges will be denied, no matter how long that job continues. Subsequent deposition testimony by NECA representative Robert Shaw (Robert Shaw Deposition, pp. 103-104, a true and correct copy of which is attached as Exhibit 3) suggests that recognition bestowed after a job is *bid*, but before work is begun, also justifies the withholding of pecuniary privileges to the new contractor for the length of the job in progress.

34. No provision in the Agreement sets a limit on the number of days the union may take to *recognize* a new contract. Significant pecuniary privileges granted to recognized local shops, but denied to a newcomer for perhaps a substantial period of time, represents a differential cost advantage that any knowledgeable potential entrant would consider before entering the protected market. Those entrants without benefit of such knowledge may find the cost differential sufficiently onerous to quit the market.

35. The reality of Section 2.07 is its disincentive to would-be entrants and its penalties threatening those who would bid and undertake work before recognition. For those entrants who neither bid nor work before

receiving the union's recognition blessing, the "place of business" requirements of Section 2.08 ensure that for at least 90 days, and most likely more, newcomers are likely to incur overhead expenses without the benefit of offsetting revenues from electrical contracting sales in the local market. These costs are obviously not incurred by recognized incumbent shops bidding on current jobs.

36. Finally, Section 2.07 provides for the enforcement of the Agreement's "place of business" requirements of Section 2.08 and for its recognition process through its labor-management grievance procedure. Whatever else, this procedure is not designed to produce impartial results that might otherwise arise from disputes between new entrants and Local 440 over compliance with Section 2.08 or recognition. This is so because such disputes affect, in no small way, the private interests of incumbent recognized employers, including members of the management side of the committee itself. This surely constitutes a conflict of interest.

37. Should the members of Southern Sierras NECA's Labor-Management committee agree with the union in its withholding of recognition or in its judgment about a failure to comply with Section 2.08, it may avoid facing competition from a new entrant on equal terms. Where the new entrant may make a significant or aggressive competitor (as was the case in this matter) and the incumbent has significant market share to lose (as was also the case in this matter) incentives are strong to maintain the status quo. Moreover, pressure on the committee is also great from other incumbent recognized shops who may fear aggressive newcomers.

38. Holding aside the significance for legitimate union goals of the "place of business" requirements in Section 2.08 and the 90-day provisions and implied penalties of Section 2.07, aggressive competitors may make difficult adversaries in collective bargaining. Unions as institutions also have a conflict of interest in deciding on accepting new entrants. More employers may mean greater bargaining power for the union and perhaps more employment for its members. On the other hand, if some of the new entrants are too vigorous in their bargaining relative to incumbents who have invested in long-term associations with union officials, it may be prudent to find ways to protect existing relationships.

39. Section 2.08 of the Agreement deals with the criteria necessary to satisfy the unions' definition of a contractor's permanent place of business. Except for the Agreement between Local 477 and Southern Sierra's NECA, I found no other Inside Wireman's Agreement that was so detailed in specifying the required physical chacteristics of the premises, its contents and its operation. A premises is defined as a place where the employer can be reached by phone, receive personal calls and mail and where the employer conducts his ordinary business. Trailers, portable buildings and answering services or a post office box are not acceptable. In reading the deposition testimony of Thomas Brady (Brady Deposition, p. 70, a true and correct copy of which is attached hereto as Exhibit 4), we know that the union expects to see the conventional symbols of business activity (i.e., the presence of desks, files and telephones) when it inspects a new shop claiming compliance with Section 2.08. Unless compliance with these requirements is met, the union will

not begin the minimum 90-day waiting period before bestowing recognition.

40. Significantly more economical ways of setting up a business while waiting to be recognized by the union are discouraged. While many incumbent recognized electrical contractors operate their businesses out of their personal residences, a new entrant setting up shop in his mobile home presumably would not be in compliance with Section 2.08.

41. Although the union's demand that an employer maintain a permanent place of business before bestowing recognition may not seem unreasonable, two facts strongly question the requirements of Section 2.08 regarding relevance to legitimate union interests. First, deposition testimony by Leland Brand (pp. 21-23, a true and correct copy of which is attached hereto as Exhibit 5), reveals that he did not check to see whether recognized contractors' places of business *continued* to comply with Section 2.08 of the Inside Wireman's Agreement after recognition.

42. Second, from Section 3.20, discussed below, it is learned that an employer without a permanent shop in the jurisdiction will be assigned to the "free zone" at the City of Riverside *as if* he had a recognized shop there. Thus, for some new entrants the union has waived its stringent compliance requirements. Although these employers may operate out of a temporary facility (trailer or portable building) with no permanent mailing address or direct telephone connection to the outside world and with no visible symbols of conventional business activity, the union will dispatch workers to their job sites. Should

these employers happen to have job sites in and around the "free zone" of Riverside, they are afforded the same pecuniary benefits available to incumbent recognized emloyers [sic] there whose offices comply with Section 2.08.

43. On the other hand, should these emloyers [sic] have job sites elsewhere, they are penalized because they do not have offices that comply with Section 2.08. This suggests that the requirements of Section 2.08 are arbitrary and unnecessary to the realization of legitimate union goals.

44. An alternative and more appealing explanation for Section 2.08 is that it functions as a mechanism to raise the costs of entry to electrical contractors located outside Local 440's jurisdiction by penalizing the bidding on job sites other than in the Riverside vicinity.

45. Section 3.20 of the Agreement is a clause ostensibly providing for compensation to workers who must travel excessive distances to an employer's shop or job site. With regard to traveling to distant job sites, however, Section 3.20, together with Sections 2.07 and 2.08, functions to divide Local 440's jurisdiction, or the County of Riverside, among competing incumbent electrical contractors.

46. In fact, the Southern Sierras NECA Agreements with Locals 440 and 477 are the only California Agreements that operate as market division schemes. All but four Agreements that I examined had a travel clause establishing "free zones" within which workers traveling to job sites were not compensated by their employer.

47. Similarly, all but four Agreements provided for subsistence payments to workers traveling to job sites beyond the borders of said "free zones." In the case of Local 440, the Agreement establishes an 18-mile "free zone" radius and $.30 per mile subsistence to traveling workers beyond the "free zone" up to $35.00 per day, to be paid by the Employer.

48. However, *only the unions associated with the Southern Sierras NECA Chapter referenced the "free zone" and the attendant subsistence payment schedule exclusively to the location of the employer's shop relative to the job site* (See Appendix I).

49. In the case of Local 440, an 18-mile "free zone" was established at the post office of the town in which the recognized employer's shop is located. Job sites within 18 miles of that post office required no travel allowance. Sites beyond that were tithed accordingly. Thus, if an employer wished to bid jobs in several different places covering considerable distances from each other, he could use only one "free zone," the one based on the location of his recognized shop.

50. In order to avoid paying subsistence on all other jobs he might bid in other towns outside of his free zone but within Riverside County, the contractor would have to open up other shops that comply with Sections 2.07 and 2.08 of the Agreement. Therefore bidding on distant jobs was more expensive than bidding on jobs closer to his existing recognized shop. Maintaining many permanent shops around the county so that the employer might be ready should a bid opportunity arise is prohibitively expensive.

51. As a result, incumbent recognized shops are able to establish little fiefdoms relatively secure from the county-based competitors located elsewhere (not to mention new entrants to the county). This interpretation is consistent with deposition statements by Dennis Thorson. Mr. Thorson testified that he once considered setting up an office in Blythe (within Local 440's jurisdiction) in order to avoid the subsistence payments he would otherwise be obliged to make. (See Ex. 5a, Thorson depo., pp. 113-114.) Additionally, before the subsistence requirements were changed in 1986, Mr. Thorson bid most of his jobs within the Palm Springs "free zone" or as close to the "free zone" as possible (See Ex. 6, Thorson depo., p. 116.) Moreover, Mr. Thorson did not bid jobs in the City of Riverside because it was "far beyond" *his* free zone (See Ex. 7, Thorson depo. p. 119.) (See Appendix III.)

52. Rather than set up an additional office in the City of Riverside, John Gomes purchased an existing recognized shop there (Gomes Deposition, pp. 29-31; 57-58, a true and correct copy of which is attached hereto as Exhibit 8). Economic theory teaches that the price Gomes paid for that firm likely included the savings associated with operating in the "free zone" of Riverside rather than paying subsistence from his Palm Springs office. In other words, Mr. Gomes had to pay a premium just to enter a new market.

53. Other California IBEW locals provide for "free zones" and subsistence payments based on the relationship between the job site and a neutral references point that does not distinguish between incumbent employers and newcomers or where they are located. Instead, legitimate union interests are expressed in concern for the

distance workers must travel to job sites from the union hall, the post office or city hall of the town in which many of the memberships reside or the respective residences of the members.

54. In the case of IBEW Locals 332, 428 and 442, employer locations are used as reference points only where subsistence payments would be lower than the union's more neutral locations. In all cases, each employer may choose the reference point most suitable for him (See Appendix I).

55. When compared with the 23 other California IBEW locals, it becomes readily apparent that the Agreement containing Sections 2.07, 2.08 and 3.20 was overly broad in pursuing legitimate union interests. The anti-competitive effects it generated, together wtih [sic] the support of NECA members discussed more fully below, cannot be outweighed in this case by the public's interest in realizing our national labor policy. The same legitimate union interests covered in the Agreement have been secured by Local 440's sister organizations in their respective Agreements without the damage to competition, competitors and consumers that Sections 2.07, 2.08 and 3.20 have brought.

B. *The Agreement's Anticompetitive Effects*

56. As discussed above, deposition testimony by Dennis Thorson established that Sections 2.07, 2.08 and 3.20 were effective in restraining his bidding activity and, thus, competition within the jurisdiction of Local 440. The deposition of Thomas Brady (Ex. 9, Thomas Brady Depo.

pp. 25-35, 68-70.) reveals that new entrants such as Fishback and Moore, Swanson Electric, Morrow Medows and Amelco were denied recognition and forced to incur higher costs to bid and work jobs in Riverside County. Similarly, Community Electric was also subjected to costs higher than incumbents.

57. The above examples deal with firms who actually entered the market and found significant barriers to remaining as viable competitors. However, economic theory predicts that significant barriers to entry should also be expected to keep *potential* competitors out.

58. Evidence from NECA membership directories for the years 1977 through 1981 provide support for this prediction. As discussed above, a substantial amount of electrical contracting in the 440 jurisdiction (perhaps as much as 85 percent) was under union contract before 1982. Thus, new entrants to Riverside County before that date were likely to affiliate with NECA and Local 440 IBEW.

59. From the Agreement, it has been established that new entrants to the vicinity of the City of Riverside need not satisfy Sections 2.07 or 2.08 to qualify for "free zone" privileges in that community. New entrants and incumbent recognized shops were treated equally, at least with regard to subsistence payments and Section 3.20. Conversely, new entrants seeking to bid on jobs in the vicinity of Palm Springs were subject to the cost disadvantages associated with Sections 2.07, 2.08 and 3.20. These firms faced significantly higher entry barriers.

60. Reference to public data on bidding permits and construction valuations in Riverside County, and in particular in the vicinity of the City of Riverside and in the vicinity of Palm Springs, show that both areas grew rapidly between 1975 and 1981. In fact, residential, commercial and industrial new construction values in the City of Riverside environs' grew at a compound annual rate of 28.4 percent during that period. Similarly, Palm Springs environs' new construction values grew at a compound annual rate of 28.7 percent in the same period. While the City of Riverside had a much larger base on which to grow relative to Palm Springs, the absolute value of the increase in both areas was sufficient to attract new entry.

61. If NECA directories for 1977 through 1981 are consulted, entries under the Riverside Division of the Southern Sierras Chapter reveal evidence consistent with the anticompetitive effects discussed above. Appendix II below is a table that presents the percentage of NECA members, with Palm Springs vicinity and Riverside City vicinity addressess, that appeared in the directory for various numbers of consecutive years.

62. For example, Appendix II shows that, in 1979, 31 percent of NECA members were listed with Riverside addresses in no more than the last four consecutive years. In other words, 69 percent were listed as members for at least four or more consecutive years. On the other hand, in 1979, only 20 percent of NECA members with Palm Springs vicinity addresses were listed in no more than the last four consecutive years. This means that, in 1979, there were a greater percentage of newcomers in the Riverside City vicinity than in the Palm Springs vicinity. This is precisely what economic theory would predict,

since Palm Springs is subject to relatively higher entry barriers.

63. The relatively greater percentage of new entrants at Riverside City appears in every year except for 1978 at the two-year level. This result is strong evidence that Local 440's entry barriers were effective in restricting competition from potential entrants outside Riverside County and the "free zone" of the City of Riverside.

## V. *COMPETITIVE HARM TO COMMUNITY ELECTRIC*

64. Like several other entrants before it, the Plaintiff, Community Electric, ran afoul of Sections 2.07, 2.08 and 3.20 of the Agreement. Although it was initially operating from a Palm Springs condominium residence with a mailing address and direct phone line, its status as a shop in compliance with Section 2.08 was always in question. By contrast, Dennis Thorson operated his shop from his residence for 20 years.

65. With its winning bid at the Indio Hospital, Community Electric demonstrated that it had entered the Palm Springs trading area as an aggressive competitor. Its bid, when compared to the runner-up, also demonstrated that incumbent competitors were accustomed to bidding much higher on comparable jobs.

66. As discussed above, the Agreement and the labor-management committee that enforced it, imposed differentially higher costs on competitors such as Community Electric, as part of a mechanism to keep entrants out and divide markets. Community Electric suffered

competitive harm in that recognition was never bestowed upon it, even though it tried to bid several jobs in the Palm Springs area. Liens assessed against it for back subsistence pay were used as signals to other general contractors that accepting or awarding Community electric a subcontract might bring with it other union problems. Consequently, the Plaintiff was deprived bid awards it might otherwise have received.

67. The market division scheme that operated through the practice of Sections 2.07, 2.08 and 3.20 prevented Community Electric from competing effectively in other parts of Riverside County outside the vicinity of the City of Riverside. This too brought competitive harm to the Plaintiff.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 1, 1987, at Washington, D.C.

/s/ Donald L. Martin
Donald L. Martin

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(Notary Public)

My commission expires

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